

2012

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### Recommended Citation

Stephanie J. Bentley, *Responding to Stern v. Marshall*, 29 Emory Bankr. Dev. J. 145 (2012).  
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol29/iss1/7>

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## RESPONDING TO STERN V. MARSHALL

### ABSTRACT

*Stern v. Marshall is the most recent decision in a series of cases decided by the Supreme Court that involves the doctrine of public rights. The Court found that although 28 U.S.C. § 157(b)(2)(C) permits a bankruptcy court to enter final judgments on all counterclaims, Article III of the Constitution does not. The Court reiterated that Article III, Section 1 of the Constitution mandates the judicial power of the United States “be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The judges for these courts must have constitutionally protected salaries and tenure. Bankruptcy judges do not enjoy these protections, and so, may not hear matters that must come before Article III courts.*

*The Supreme Court applied the relevant case law to its analysis in Stern, including American Insurance Co., Murray’s Lessee, Ex parte Bakelite Corp., Crowell, Thomas, Northern Pipeline Construction Co., Commodity Futures Trading Commission, and Granfinanciera. Chief Justice Roberts, writing for the majority, relied heavily on Murray’s Lessee and Northern Pipeline despite more recent precedent. The Court glossed over the most important issue for bankruptcy courts in a footnote of its decision: “Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here . . . .” By declining to discuss further the public rights framework for bankruptcy, the Court left bankruptcy judges and practitioners to rely on precedent that is not dispositive—some of it very shaky. This Comment proposes a seven-factor analysis to help guide bankruptcy judges and practitioners, and to help shed some light on how to determine whether a matter is a public right and so may be heard and decided by a bankruptcy court.*

## INTRODUCTION

In the Supreme Court's recent decision, *Stern v. Marshall*,<sup>1</sup> the Court held that 28 U.S.C. § 157(b)(2)(C), with respect to a state law counterclaim, violated the Constitution. Chief Justice Roberts wrote: "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984."<sup>2</sup> While the Court attempted to limit the scope of *Stern*, the Court confirmed that judges can no longer rely on Congress's interpretation of a "core" proceeding.<sup>3</sup> To circumvent this problem, this Comment proposes, that when there is doubt over whether a bankruptcy judge may constitutionally treat a proceeding as "core," the court make the inquiries prescribed, albeit breezily, by Chief Justice Roberts, in a part of the majority opinion that is essentially dicta.<sup>4</sup> These inquiries, which this Comment refers to as the "*Stern* factors,"<sup>5</sup> are whether the matter:

- (1) can be pursued only by the grace of the other branches;
- (2) historically could have been determined exclusively by the other branches;
- (3) depends on the will of Congress;
- (4) flows from a regulatory scheme;
- (5) is completely dependent upon adjudication of a claim created by federal law;
- (6) is limited to a particularized area of the law; and
- (7) is a situation in which Congress created an expert an inexpensive way to deal with a class of questions of fact particularly suited for examination and determination by an administrative agency.

Despite more recent precedent, the Court in *Stern* followed the plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>6</sup> in which the Court held that whether a matter may be heard by an Article I court without violating the Constitution ultimately depends on if it falls within the

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<sup>1</sup> 131 S. Ct. 2594 (2011).

<sup>2</sup> *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

<sup>3</sup> *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp.)*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011).

<sup>4</sup> *Stern*, 131 S. Ct. at 2613–15.

<sup>5</sup> *See id.* at 2613–15.

<sup>6</sup> 458 U.S. 50 (1982).

“public rights doctrine.”<sup>7</sup> For the Court in *Stern*, this meant that whether a proceeding is a “core proceeding” also depends on whether it falls within the “public rights doctrine.”<sup>8</sup> However, the Court declined to define or even further discuss the “public rights framework” of bankruptcy.<sup>9</sup> Consequently, judges and other practitioners have been left to determine whether a proceeding fits within the public rights doctrine and how those public rights relate to bankruptcy. The difficulty with leaving this responsibility to bankruptcy judges is that Supreme Court precedent on public rights is unclear.

The benefit of the process proposed in this Comment is that these inquiries relate to each previous public rights case. If properly followed, these inquiries ensure the identification of a “core” proceeding within the public rights framework for bankruptcy, regardless of what the Supreme Court chooses to do next with this doctrine.

### I. BACKGROUND AND THE EFFECT OF *STERN V. MARSHALL*

*Stern* has a long and twisted history in the American judicial system.<sup>10</sup> Vickie Lynn Marshall, known to most as Anna Nicole Smith, married J. Howard Marshall in 1994.<sup>11</sup> J. Howard died only a year after their marriage at the age of 90.<sup>12</sup> Before J. Howard passed away, Vickie sued his son Pierce in Texas probate court, alleging that Pierce tortiously interfered with her expectation of an inheritance from her husband through fraud and undue influence over J. Howard.<sup>13</sup> Pierce counterclaimed, alleging that Vickie and her lawyers had defamed him.<sup>14</sup>

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<sup>7</sup> See *Stern*, 131 S. Ct. at 2609–11.

<sup>8</sup> See *id.*

<sup>9</sup> *Id.* at 2614 n.7 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–56 (1989) (citations omitted)).

<sup>10</sup> *Marshall v. Marshall*, 547 U.S. 293 (2006). Its recent trip to the Supreme Court was its second. A previous issue in the case, regarding the probate exception to federal jurisdiction as it related to bankruptcy courts, was decided in May 2006. *Id.*

<sup>11</sup> *Marshall v. Marshall (In re Marshall)*, 253 B.R. 550, 554 (Bankr. C.D. Cal. 2000), *adopted as modified*, 275 B.R. 5 (C.D. Cal. 2002), *vacated and remanded*, 392 F.3d 1118 (9th Cir. 2004), *rev'd and remanded sub nom. Marshall v. Marshall*, 547 U.S. 293 (2006), *rev'd*, 600 F.3d 1037 (9th Cir. 2010), *aff'd sub nom. Stern*, 131 S. Ct. 2594.

<sup>12</sup> See *id.* at 553–54.

<sup>13</sup> Kenneth N. Klee, *Klee on Stern v. Marshall*, 2011 LEXIS EMERGING ISSUES ANALYSIS 5743, at 1–2 (June 2011).

<sup>14</sup> *Marshall v. Marshall (In re Marshall)*, 600 F.3d 1037, 1043 (9th Cir. 2010), *aff'd sub. nom. Stern*, 131 S. Ct. 2594.

After J. Howard's death, but before the case in Texas was fully litigated, Vickie filed for bankruptcy in California.<sup>15</sup> Pierce then dismissed his case in the Texas court against Vickie and filed (1) an adversary hearing in the bankruptcy case to obtain a declaration that defamation liability was non-dischargeable and (2) a proof of claim for damages resulting from the alleged defamation.<sup>16</sup> Vickie predictably filed a counterclaim in the bankruptcy case against Pierce, again alleging tortious interference with her expectation of an inheritance.<sup>17</sup> Ultimately, the bankruptcy court awarded Vickie \$449,754,134, less any amount that she would recover in the case pending in probate court.<sup>18</sup> Pierce's claim of defamation was settled in favor of Vickie on summary judgment.<sup>19</sup> Originally, the bankruptcy court ordered that entry of judgment on her counterclaim should wait because the damages could not be calculated until a decision was made on how much inheritance Vickie was entitled to receive.<sup>20</sup> However, the bankruptcy court was later persuaded that it could enter judgment before the probate court's decision, "in a form to take account of any recovery . . . in the Texas probate action."<sup>21</sup> The award included damages to Vickie for her counterclaim against Pierce and, as the court emphasized, was also the result of Pierce's egregious discovery violations.<sup>22</sup>

To determine the outcome of Vickie's counterclaim, the California bankruptcy court looked to Texas case law to determine whether it recognized a cause of action for tortious interference in the expectation of a gift.<sup>23</sup> While determining that Texas did recognize this cause of action, the bankruptcy court could not identify the elements used for tortious interference.<sup>24</sup> Consequently, the court applied the law of "other jurisdictions," citing a New Mexico case as well as secondary sources, and concluded that tortious interference involved five elements, which it then applied to the case.<sup>25</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *In re Marshall*, 600 F.3d at 1043–44.

<sup>17</sup> *Id.* at 1044–45.

<sup>18</sup> *In re Marshall*, 253 B.R. at 561–62.

<sup>19</sup> *Id.* at 556 n.16.

<sup>20</sup> *Marshall v. Marshall (In re Marshall)*, 257 B.R. 35, 40 (C.D. Cal. 2000) *aff'd in part, vacated in part, rev'd in part*, 264 B.R. 609 (C.D. Cal. 2001).

<sup>21</sup> *Id.*

<sup>22</sup> *In re Marshall*, 253 B.R. at 553.

<sup>23</sup> *Id.* at 559.

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at 559–60.

Pierce appealed to the district court, claiming the bankruptcy court lacked jurisdiction over the counterclaim because it was not a “core proceeding.”<sup>26</sup> The district court agreed and reversed the bankruptcy court’s decision on this basis, and then went on to decide the matter for itself (finding in Vickie’s favor) even though the Texas Probate Court had finally reached its own decision (in favor of Pierce).<sup>27</sup> The case then went before the Ninth Circuit Court of Appeals.<sup>28</sup> The court of appeals reversed, but only to the extent that it held the Texas court’s decision should have been given preclusive effect.<sup>29</sup> Vickie appealed to the Supreme Court.<sup>30</sup>

The Supreme Court considered the constitutionality of Congress’s grant of jurisdiction to bankruptcy courts in the Bankruptcy Amendments and Federal Judgeship Act of 1984 for the first time in *Stern*, decided in June 2011.<sup>31</sup> The Court specifically addressed whether a bankruptcy court could, without violating the Constitution, enter a final judgment on a counterclaim seeking damages for the tortious interference of the expectation of an inheritance brought in a bankruptcy proceeding.<sup>32</sup> The majority opinion, written by Chief Justice Roberts, stated: “Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie’s counterclaim, Article III of the Constitution does not.”<sup>33</sup> The Court grounded a great deal of its decision in the doctrine of public rights,<sup>34</sup> as developed in *Murray’s Lessee v. Hoboken Land & Improvement Co.*,<sup>35</sup> *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>36</sup> and *Granfinanciera S.A. v. Nordberg*.<sup>37</sup>

Among the cases principally relied upon in *Stern*, *Murray’s Lessee* was important to the Court because it was the first Supreme Court case to address the doctrine of “public rights.” Justice Curtis, writing for the majority in

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<sup>26</sup> *Stern v. Marshall*, 131 S. Ct. 2594, 2601–02 (2011).

<sup>27</sup> *Id.* at 2602.

<sup>28</sup> *Id.* at 2602–03.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See Stern*, 131 S. Ct. 2594. The word “jurisdiction,” as it relates to bankruptcy courts, is used loosely throughout this Comment. Bankruptcy courts do not technically have jurisdiction. Instead, jurisdiction is invested in the district courts. The issue in *Stern* was whether bankruptcy courts have the power, without violating the Constitution, to hear and enter final judgment on the various cases assigned to it.

<sup>32</sup> *See id.*

<sup>33</sup> *Id.* at 2608.

<sup>34</sup> *See id.* at 2610–15 (2011).

<sup>35</sup> 59 U.S. (18 How.) 272 (1855).

<sup>36</sup> 458 U.S. 50, 73 (1982).

<sup>37</sup> 492 U.S. 33 (1989).

*Murray's Lessee*, concluded that Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty.”<sup>38</sup> From this, Chief Justice Roberts found that it was “clear that the Bankruptcy Court in this case exercised the ‘judicial Power of the United States’ [when it purported] to resolve and enter final judgment” on the counterclaim.<sup>39</sup>

Chief Justice Roberts treated *Northern Pipeline* as the seminal case in determining the validity of the bankruptcy court’s decision. The Supreme Court in *Northern Pipeline* held that the public rights doctrine did not permit bankruptcy courts to hear and enter final judgments on a state law case brought by a debtor against a company that had not filed a claim in that particular bankruptcy case.<sup>40</sup> Similarly, the Supreme Court in *Granfinanciera* held that the public rights doctrine did not permit a fraudulent conveyance action to be “filed on behalf of a bankruptcy estate against a non-creditor in a bankruptcy proceeding.”<sup>41</sup> The Court concluded that, combined, these cases meant that a “state law action independent of the federal bankruptcy law” could not be included within the public rights exception.<sup>42</sup>

The Court conceded that since the decision in *Northern Pipeline*, the public rights doctrine had been broadened. The doctrine now includes matters in which “the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority,” or where the right involved was “integrally related to particular federal government action.”<sup>43</sup> The counterclaim in *Stern* was not a claim typically pursued only by the grace of other branches, historically determined exclusively by those branches, completely dependent upon adjudication of a claim created by federal law, nor did the claim for relief flow from a federal statutory scheme.<sup>44</sup> Rather, the matter was a “state law action independent of the federal

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<sup>38</sup> *Murray's Lessee*, 59 U.S. (18 How.) at 284.

<sup>39</sup> *Stern*, 131 S. Ct. at 2611.

<sup>40</sup> See *Stern*, 131 S. Ct. at 2609–10 (quoting *N. Pipeline*, 458 U.S. at 87 n.40 (plurality opinion)).

<sup>41</sup> *Stern*, 131 S. Ct. at 2614 (citing *Granfinanciera*, 492 U.S. at 54–55).

<sup>42</sup> *Id.* at 2611.

<sup>43</sup> *Id.* at 2613 (discussing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 836 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 73 U.S. 568, 571–75 (1985)).

<sup>44</sup> *Id.* at 2614.

bankruptcy law,” that did not “depend on the will of Congress,” and was “not limited to a ‘particularized area of law.’”<sup>45</sup>

The bankruptcy court could not hear and enter a final decision in the counterclaim without violating the Constitution because the counterclaim was not a public right.<sup>46</sup> However, the Court did not clarify the meaning of “public rights” as the term relates to bankruptcy law. In a footnote, the Court reiterated a statement made in *Granfinanciera*:

We noted that we did not mean to “suggest that the restructuring of debtor-creditor relations is in fact a public right.” Our conclusion was that, “even if one accepts this thesis,” Congress could not constitutionally assign the resolution of the fraudulent conveyance action to a non-Article III court. Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here.<sup>47</sup>

By highlighting the public rights doctrine without shedding any light on its scope, the Supreme Court has imposed a responsibility on bankruptcy court judges to create an infrastructure that does not violate Article III.

Therefore, in considering whether public rights may be used to invoke bankruptcy court jurisdiction, practitioners and bankruptcy judges can only look to the constitutional roots of bankruptcy proceedings, the history of bankruptcy in federal jurisprudence, and the difficult to follow Supreme Court decisions that address the subject. Until a future Supreme Court decision, the only means of determining whether a matter is a public right is to examine, case-by-case, the factors that various Supreme Court cases have used to determine when a matter is a public right. Given the divergent types of analyses relied on in the public rights cases, it is possible that the *Stern* factors may not all point to the same outcome. However, this is the unfortunate consequence of a decision that tantalizes but, in the end, fails to satisfy curiosity.

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<sup>45</sup> *Id.* at 2614–15 (2011) (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 284 (1856)).

<sup>46</sup> *See id.* at 2611.

<sup>47</sup> *Id.* at 2614 n.7 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–56 (1989)) (citations omitted).



## II. CONGRESSIONAL POWERS

### A. *The Power to Establish Article I Courts*

Bankruptcy courts are Article I courts (also referred to as legislative courts). Article I courts are created by Congress to execute its powers; Article I court judges do not have, or need, Article III tenure and compensation protections.<sup>48</sup> The Supreme Court introduced the concept of legislative courts in *American Insurance Co. v. Canter*.<sup>49</sup> The plaintiffs argued that an order for the sale of cotton issued by the Court of Key West was invalid because the issuing court was an “incompetent tribunal.”<sup>50</sup> The tribunal in question was established by an act of the territorial legislature of Florida.<sup>51</sup> Therefore, the sale would be valid only if the territorial legislature was competent to enact the law.<sup>52</sup> Chief Justice Marshall, writing for the Supreme Court, emphasized the importance of the relationship between Florida and the United States.<sup>53</sup> He wrote that even though Florida inhabitants enjoyed the same benefits as citizens of the United States, “[t]hey do not, however, participate in political power; they do not share in the government till Florida shall become a state.”<sup>54</sup> As a result, Florida was a territory governed by Congress according to Article IV, Section 3, Clause 2 of the Constitution, which gives Congress the power “to make all needful rules and regulations respecting the territory, or other property belonging to the United States.”<sup>55</sup>

The jurisdiction of Florida’s territorial courts covered all criminal cases and only civil cases arising under the laws of that territory, and the judges of these courts were to hold their offices for four years.<sup>56</sup> From this, Chief Justice Marshall concluded that these courts were not Article III courts, but rather “legislative Courts, created in virtue of the general right of sovereignty which exists in the government,” or, by virtue of Article IV, Section 3, Clause 2.<sup>57</sup> The limitations on federal courts in the states, therefore, did not extend to the

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<sup>48</sup> See *Ex parte Bakelite Corp.*, 279 U.S. 438, 450 (1929).

<sup>49</sup> See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 514 (1828).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 541.

<sup>52</sup> *Id.* The libellants argued that the act was “inconsistent with both the law and the [C]onstitution; that it is inconsistent with the provisions of the law, by which the territorial government was created.” *Id.* at 543.

<sup>53</sup> *Id.* at 542.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 541–42 (citing U.S. CONST. art. IV, § 3, cl. 2).

<sup>56</sup> *Id.* at 544.

<sup>57</sup> *Id.* at 546.

territories. Congress could legislate for the territory because in doing so, Congress acted as a state government would for a state.<sup>58</sup> The law created by the territorial legislature was not unconstitutional and, thus, was valid.<sup>59</sup>

Congress may also statutorily open federal courts in the states to actions brought by a citizen of the District of Columbia (“D.C.”), against a citizen of one of the states.<sup>60</sup> The statute only gave federal courts jurisdiction over controversies of a judiciable nature; it did not confer power to participate in legislative, political, or administrative functions.<sup>61</sup> Congress may exercise judicial power to: (1) pay debts of the United States;<sup>62</sup> (2) confer the district courts jurisdiction of non-diversity suits involving only state law questions;<sup>63</sup> and (3) “to make uniform laws on the subject of bankruptcies,” in Article I, Section 8, Clause 4 (the “Bankruptcy Clause”).<sup>64</sup> Accordingly, Article I was the source of power for reorganizations and bankruptcies.<sup>65</sup>

By virtue of the Bankruptcy Clause, Congress has the power to authorize Article III courts to hear non-Article III matters.<sup>66</sup> Thus, a trustee could bring a plenary suit in personam in a district court because the district court’s jurisdiction (in a case where the trustee relies only on state law) flowed from federal law.<sup>67</sup> A case flows from a federal law (and so is conferred congressional power by Article III)<sup>68</sup> when:

[A] right or immunity created by the Constitution or laws of the United States [is] an element . . . of the plaintiff’s cause of action . . . The right or immunity must be such that it will be

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* It has been contended that one of the primary reasons for finding that the territorial courts were not Article III, but rather Article I courts was that:

If and when a territory became a state, a significant portion of the duties performed by its courts was to be assumed by a newly established state judiciary. If the judges of the territorial courts had the life tenure protections of Article III, Congress would have been hard pressed to know what to do with many of them.

MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 55 (2d ed. 1990).

<sup>60</sup> *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 583 (1949).

<sup>61</sup> *Id.* at 591.

<sup>62</sup> *Id.* at 592.

<sup>63</sup> *Id.* at 596–99.

<sup>64</sup> *Id.* at 594.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 594–99.

<sup>67</sup> *Id.* at 596.

<sup>68</sup> *Id.* at 599.

supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.<sup>69</sup>

Also pursuant to Article I, Congress may create a statute for D.C. (the “D.C. Code”) that provides for trying local criminal cases before judges without Article III protections because D.C. citizens, like the citizens of states, do not have a constitutional right to be tried before Article III courts when charged with a criminal violation.<sup>70</sup> The D.C. Code did not arise “under the law of the United States;” if the D.C. Code did arise “under the law of the United States,” then the prosecution of matters pursuant to the D.C. Code by Article I courts would be an unconstitutional exercise of Article III power.<sup>71</sup> Congress has the discretion over the creation of inferior federal courts; however, if Congress does create these courts, it is not *required* to grant them “all the jurisdiction it was authorized to bestow under Art. III.”<sup>72</sup>

The enforcement of criminal laws has never been the “exclusive province” of Article III.<sup>73</sup> Congress’s decision to create D.C. courts with judges not given Article III status was grounded in efficiency and the fact that the majority of states did not provide state judges with protections equivalent to those in Article III.<sup>74</sup> In considering the D.C. Code, Congress’s (and the Court’s) comparison to state courts may be misguided for two reasons: first, Article III does not constrain the states, but does limit Congress; and second, the tenure and salary provisions of Article III help ensure the judiciary’s independence from the federal legislative and executive branches, but state courts are already independent from these federal branches.<sup>75</sup>

The constitutionality of bankruptcy courts as Article I courts depends on whether Congress has the power to create non-Article III courts to deal with bankruptcy and the limits on that power. Article I gives Congress the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States,”<sup>76</sup> and this power is strengthened by the power “[t]o make all

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<sup>69</sup> *Id.* at 597 (quoting *Gully v. First Nat’l Bank*, 299 U.S. 109, 112–13 (1936)) (emphasis omitted).

<sup>70</sup> *Palmore v. United States*, 411 U.S. 389, 390–91 (1973).

<sup>71</sup> *Id.* at 400.

<sup>72</sup> *Id.* at 401.

<sup>73</sup> *Id.* at 402 (emphasis added).

<sup>74</sup> *Id.* at 409–10. The Court of Appeals for the District of Columbia found that “46 of the 50 states have not provided life tenure for trial judges who hear felony cases.” *Id.* at 410. *But see* discussion *infra* Part II.E. (discussing the opinion in *Northern Pipeline* that Congress’s interest in creating an efficient bankruptcy system was not sufficient basis for granting bankruptcy courts broad jurisdiction).

<sup>75</sup> REDISH, *supra* note 59, at 63–64.

<sup>76</sup> U.S. CONST. art. I, § 8, cl. 4.

Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”<sup>77</sup>

Article III limits Congress’s powers by (1) creating a federal judiciary, (2) establishing the conditions of the judiciary appointments, and (3) painting in broad strokes the scope of the judiciary’s power. Article III mandates that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, Laws of the United States, and Treaties made . . . to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party . . . .<sup>78</sup>

### *B. Congress’s Power Under the Bankruptcy Clause*

Congress may create some Article I courts pursuant to its specific powers. Under the Bankruptcy Clause, the main constraint on Congress’s power is the “uniformity requirement.”<sup>79</sup> Aside from this limitation, congressional powers regarding bankruptcy included “the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property.”<sup>80</sup> Unlike state governments, Congress has the power over contracts, which “extends to all cases where the law causes to be distributed, the property of the debtor among his creditors.”<sup>81</sup> Article I, Section 10, Clause 1 of the Constitution (the “Contract Clause”) reflects “[t]he Framers’ intent to achieve uniformity among the Nation’s bankruptcy laws.”<sup>82</sup> Attempts made by members of the Constitutional Convention to prohibit the federal government from interfering

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<sup>77</sup> *Id.* cl.18.

<sup>78</sup> *Id.* art. III, §2; *see also id.* art. I, § 8 (“The Congress shall have the Power . . . [t]o constitute Tribunals inferior to the supreme Court.”). The limits on Congress’s powers to interfere with the judiciary were emphasized in *Murray’s Lessee*. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *see also* discussion *supra* Part II.C.1.

<sup>79</sup> *Ry. Labor Execs.’ Assn. v. Gibbons Tr.*, 455 U.S. 457, 472 (1982) (finding that RITA violated the Uniformity Clause of the Constitution because it applied to only one regional bankrupt railroad and thus the employee protection provisions therein could not be said to apply equally to all creditors and debtors). Here, the Court refers to the Bankruptcy Clause as the Uniformity Clause. *See* U.S. CONST. art. I, § 8, cl. 4 (“To establish . . . uniform laws on the subject of bankruptcies throughout the United States . . . .” (emphasis added)).

<sup>80</sup> *Ry. Labor Execs.’ Assn.*, 455 U.S. at 466 (quoting *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 188 (1902)).

<sup>81</sup> *Id.* at 466 (quoting *Hanover Nat’l Bank*, 186 U.S. at 186); *see also* U.S. CONST. art. I, § 10, cl. 1.

<sup>82</sup> *Ry. Labor Execs.’ Assn.*, at 472 n.14; *see also* U.S. CONST. art. I, §10, cl. 1 (“No State shall enter into any . . . Law impairing the Obligation of Contracts . . .”).

with contracts failed because the framers recognized that the prohibition would undermine the legislative power to pass laws on bankruptcy.<sup>83</sup>

James Madison explained that Congress was given the power to create uniform laws on bankruptcies because of the intimate connection between bankruptcy and interstate commerce. Madison wrote:

The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties live, or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn into question.<sup>84</sup>

Congress may also prevent states from passing or enforcing laws that would interfere with any national bankruptcy statute.<sup>85</sup> Although the Eleventh Amendment protects state sovereignty, states may “still be bound by some judicial actions without” waiving their immunity.<sup>86</sup> In fact, the Supreme Court has held that the states, “whether or not they choose to participate in the proceeding, are bound by a bankruptcy court’s discharge order no less than other creditors.”<sup>87</sup> Additionally, Congress may authorize Article III courts to hear non-Article III matters because judicial power was conferred under Article I.<sup>88</sup> Precedent could be construed to argue that the Bankruptcy Clause is the source of congressional power regarding *all* cases relating to bankruptcies, in both Article I and Article III courts.<sup>89</sup>

Unfortunately, Congress’s power under the Bankruptcy Clause to create bankruptcy courts is controlled by the public rights doctrine. The definition of “bankruptcy” will help ultimately determine the limits of Congress’s power to

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<sup>83</sup> Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995).

<sup>84</sup> THE FEDERALIST NO. 42 (James Madison) (E.H. Scott, ed. 1898); Tabb, *supra* note 83, at 13. Congress’s power regarding bankruptcy implicates its power over contracts, its power over interstate commerce, and as some cases suggest, the Necessary and Proper Clause. Why the thrust of these clauses—or the combined “constitutional grant of power”—is not understood as giving Congress “extraordinary control over the precise subject matter at issue,” is puzzling. Recall that an “extraordinary control over the precise subject matter at issue” would allow Congress to create Article I courts for the determination of bankruptcy matters, as it does for territories and courts-martial, regardless of public rights. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 66 (1982) (plurality opinion).

<sup>85</sup> See *Int’l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1928); see also U.S. CONST. art. I, § 8, cl. 4.

<sup>86</sup> *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004).

<sup>87</sup> *Id.* at 441 (citing *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933)).

<sup>88</sup> See *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1948).

<sup>89</sup> An argument later rejected by *Northern Pipeline* and *Stern*. See *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011); *N. Pipeline*, 458 U.S. at 76 (plurality opinion); see also U.S. CONST. art. I, § 8, cl. 4.

create bankruptcy courts (eventually, through the application of the *Stern* factors).<sup>90</sup> Under the current system, bankruptcy courts must “provide an equitable system for distribution of a debtor’s assets to creditors in the event of bankruptcy.”<sup>91</sup> The Supreme Court has recognized that: “The subject of bankruptcies is incapable of final definition. The concept changes . . . [but] is nothing less than the ‘subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.’”<sup>92</sup> Precedent has established that bankruptcy courts (as Article I courts) may only hear and enter final determinations on matters that are public rights.<sup>93</sup> Whether a matter is a public right has been the subject of intensive inquiry, with no bright-line rule. As discussed above, the application of the *Stern* factors requires an understanding of the difficult to follow course of Supreme Court decisions that address the public rights doctrine, as well as an understanding of the legislative history for the current bankruptcy system.<sup>94</sup>

### C. *The Development of the Public Rights Doctrine (1828–1977)*

#### 1. *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>95</sup>

In *Murray’s Lessee*, the Court held that Congress did not violate the Constitution when it statutorily authorized proceedings under a distress warrant issued by the Solicitor of the Treasury because such proceedings were executive acts, not judicial.<sup>96</sup> The Court’s analysis first considered whether the particular warrant at issue constituted due process, which he defined as “by law of the land.”<sup>97</sup> To determine whether Congress satisfied due process of law with respect to a particular act, a court must first look to the Constitution for an indication of whether a particular process created by Congress conflicted with any other constitutional provisions.<sup>98</sup> If no conflict is identified, a court should

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<sup>90</sup> See discussion *supra* Part I.

<sup>91</sup> S. REP. NO. 98-55, at 3 (1st Sess. 1983).

<sup>92</sup> *Wright v. Union Cent. Ins. Co.*, 304 U.S. 502, 513–14 (1938) (internal citation omitted). This definition is later used in *Northern Pipeline*, *Granfinanciera*, and in footnote seven of *Stern*. See *Stern*, 131 S. Ct. at 2614 n.7.

<sup>93</sup> See *Stern*, 131 S. Ct. 2594; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *N. Pipeline*, 458 U.S. 50.

<sup>94</sup> See *supra* discussion Part I.

<sup>95</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

<sup>96</sup> See *id.* at 274.

<sup>97</sup> *Id.* at 275–76. Congress was limited here because it could not merely make any process “due process of the law” to suit its own needs. *Id.* at 276.

<sup>98</sup> *Id.* at 275–76.

then look to any “settled usages and modes” for proceedings that existed in both common and statutory law in England, the states as they were before the Declaration of Independence, and the states as they were before the Constitution.<sup>99</sup> Justice Curtis determined that “there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues.”<sup>100</sup> As a result, the proceedings authorized in *Murray’s Lessee* satisfied due process of law.<sup>101</sup>

Justice Curtis stated that equitable claims to land by the inhabitants of ceded territories were examples of cases that “form a striking instance of such a class of cases”—the class of cases being those that involve public rights.<sup>102</sup> These cases depend “upon the will of congress” as to whether a remedy in the courts would even be allowed.<sup>103</sup> Congress acted within its power when it consented that the government may be sued and, because Congress consented, it was entitled to set the rules and terms for the proceedings in which it would be sued.<sup>104</sup> Therefore, giving power to the executive—in this manner—was constitutional.<sup>105</sup> The matter of partially or fully waiving sovereign immunity with regard to Congress’s power to tax, combined with Congress’s power under the Necessary and Proper Clause, as well as Congress’s creation of a statutory scheme relating to its tax power, was a matter that could be pursued by the grace of the legislative branch, and therefore depended upon the will of Congress.

## 2. Ex Parte Bakelite Corp.<sup>106</sup>

Bakelite Corp. (“Bakelite”) petitioned the Supreme Court for a writ of prohibition to the Court of Customs Appeals.<sup>107</sup> The writ, if issued, would prohibit the Court of Customs Appeals from considering appeals of findings by the Tariff Commission pursuant the Tariff Act of 1922.<sup>108</sup> Under the Tariff Act, the Tariff Commission was given the power to assist the President by

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<sup>99</sup> *Id.* at 277.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 280.

<sup>102</sup> *Id.* at 284.

<sup>103</sup> *Id.*

<sup>104</sup> *See id.* at 283.

<sup>105</sup> *Id.* at 285.

<sup>106</sup> *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 439.

“investigating allegations of unfair practice, conduct hearings, receive evidence and, making findings and recommendations, subject to the right in the importer or consignee.”<sup>109</sup> The findings and recommendations could then be appealed to the Court of Customs Appeals, but only as to the questions of law that affected the findings.<sup>110</sup> Decisions by the Court of Customs Appeals could then, if needed, be subject to Supreme Court review.<sup>111</sup>

Bakelite challenged the jurisdiction of the Court of Customs Appeals, arguing that Congress created it pursuant to Section 1 of Article III, and so, the court could not have jurisdiction over proceedings not considered a “case or controversy” under Article III, Section 2.<sup>112</sup> Bakelite argued that the proceeding before the Tariff Committee was not a “case or controversy” but an advisory proceeding “in aid of [an] executive action.”<sup>113</sup> Justice Van Devanter explained that Article III did not “express the full authority of Congress to create courts,” because other articles gave Congress the power to create courts to help carry “those [other] powers into execution” as well.<sup>114</sup> The Court concluded that the Court of Customs Appeals was not an Article III court but an Article I (legislative) court.<sup>115</sup> Because the Court of Customs was an Article I court, there was no need to decide whether the pending proceeding was a “case or controversy” under Article III.

Legislative courts may be special tribunals created to determine matters arising between the government and others which, based on their nature, do not require “judicial determination,” though they may still be determined by an Article III court.<sup>116</sup> Suits against the government in the Court of Claims were not controlled by the Seventh Amendment and were not suits at common law “within its true meaning.”<sup>117</sup> Since the government may not be sued unless the government consents, Congress can prescribe how the government is sued.<sup>118</sup> Therefore, if the “claimant avail[ed] himself of the privilege granted [to sue the

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<sup>109</sup> *Id.* at 446–47.

<sup>110</sup> *Id.* at 447.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 447–48.

<sup>113</sup> *Id.* at 448.

<sup>114</sup> *Id.* at 449.

<sup>115</sup> *Id.* at 460–61.

<sup>116</sup> *Id.* at 451.

<sup>117</sup> *Id.* at 453.

<sup>118</sup> *Id.* at 453–54.



government], he must do so subject to the conditions [set] by the government.”<sup>119</sup>

To determine the appropriate jurisdictions of the Court of Customs Appeals and the Customs Court, the Court briefly reviewed the history of each court.<sup>120</sup> The Customs Court was formerly the Board of General Appraisers, an executive agency responsible for “reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties.”<sup>121</sup> Congress changed the name of the board to the Court of Customs, but did not alter any of the board’s duties, powers, or personnel.<sup>122</sup> The board’s functions, “although mostly quasi-judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.”<sup>123</sup> Thus, the functions performed by the Court of Customs and the Court of Customs Appeals were historically handled by the executive branch.

Bakelite also argued that the absence of a provision on the tenure of Court of Claims judges was evidence Congress meant to establish the court under Article III.<sup>124</sup> The Court concluded that this argument was “fallacious” because it “mistakenly assume[d] that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.”<sup>125</sup> While the Court refused to view congressional intent as determinative of the court’s class, the Court did find relevant the fact that Congress had only ever given the Court of Claims the power to issue advisory opinions on certain matters—suggesting Congress treated the Court of Claims as a legislative court.<sup>126</sup> A few

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<sup>119</sup> *Id.* at 454.

<sup>120</sup> *Id.* at 452, 457–58.

<sup>121</sup> *Id.* at 457.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 458 (emphasis added). Quasi-judicial means “of, relating to, or involving an executive or administrative official’s adjudicative acts. Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts.” BLACK’S LAW DICTIONARY 1411 (9th ed. 2009). Recall the first two *Stern* factors—whether the matter (1) can be pursued only by the grace of the other branches; and, (2) historically could have been determined exclusively by the other branches. See *supra* Part III.

<sup>124</sup> *Ex parte Bakelite*, 279 U.S. at 459.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* This conclusion is striking and strange because the jurisdiction conferred by Congress may also be evidence of congressional intent, *Ex parte Bakelite Corp.* and *Williams* are no longer law. REDISH, *supra* note 59, at 58–59. Congress responded to the Court’s decisions in *Ex parte Bakelite Corp.* and *Williams* by providing in its Act of July 28, 1953 that both the United States Court of Customs and Patent Appeals and the United States Court of Claims were established under Article III. *Glidden Co. v. Zdanok*, 370 U.S. 530, 531–32 (1962) (citing Act of July 28, 1953, § 1, 67 Stat. 226 (codified as amended at 28 U.S.C. § 171 (2006))

years later the Court made a similar decision in *Williams v. United States*,<sup>127</sup> in which it considered whether Congress could reduce the salaries of judges sitting on the Court of Claims without violating that constitution.<sup>128</sup> The Court in *Williams* held that the Court of Claims was created pursuant to Congress's Article I powers.<sup>129</sup>

The Court later addressed its *Bakelite* and *Williams* decisions in *Glidden Co. v. Zdanok*, decided by the Supreme Court in 1962.<sup>130</sup> The Court in *Glidden* questioned the assumption, expressed in both *Bakelite* and *Williams*, that for Congress to effectively grant jurisdiction to an administrative agency, it need only codify that jurisdiction.<sup>131</sup> The Court in *Glidden* explained that the *Bakelite* and *Williams* courts misunderstood the thrust of *Murray's Lessee*.<sup>132</sup> Read correctly, *Murray's Lessee* supports the proposition that Congress may choose to create tribunals under Article III to adjudicate matters that may also be determined by legislative and executive decision.<sup>133</sup> According to the Court in *Glidden*, Congress's power under Article I to create courts inferior to the Supreme Court has never been relied on as authority for Congress to create non-Article III tribunals.<sup>134</sup> The assignment of the Court of Claims judges—

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(Court of Claims); Act of August 25, 1958, § 1, 72 Stat. 848 (repealed 1982) (Court of Customs and Patent Appeals); *see also* Act of July 14, 1956, § 1, 70 Stat. 532 (codified as amended at 28 U.S.C. § 251 (2006)) (Customs Court).

<sup>127</sup> 289 U.S. 553 (1933).

<sup>128</sup> *Id.* at 561.

<sup>129</sup> *Id.* at 581.

<sup>130</sup> *Glidden*, 370 U.S. 530.

<sup>131</sup> *Id.* at 541–43. The Supreme Court combined *Glidden* with *Lurk v. U.S. District Court for the District of Columbia*. REDISH, *supra* note 59, at 60 n.49. The cases related to two assignment statutes, the first of which permitted the Chief Justice to temporarily assign a judge from the Court of Claims or the Court of Customs and Patent Appeals to any court of appeals or district court for necessity. *Glidden*, 370 U.S. at 532 n.2 (quoting 28 U.S.C. § 293(a)). The second case authorized the assignment of retired judges from either the Court of Claims or the Court of Customs and Patent Appeals to Article III courts. *Id.* at 532 n.3 (quoting 28 U.S.C. § 294(d)). The petitioners in these cases argued that they were denied the constitutional protection of judges with life tenure and non-diminishable compensation as a result of these Acts. *Id.* at 533. The Court limited its analysis to whether the judgment in either case was vitiated by the respective participation of the judges. *Id.* The case was made more confusing because both judges at the time had statutorily protected tenure and salary, rather than constitutionally protected tenure and salary. *Id.* at 534. Without constitutional protection, a subsequent Congress would not be bound by these statutory protections. *Id.* Whether the judges had constitutionally protected tenure and salary at the time of their confirmation depended on the constitutional status of the courts to which they were appointed. *Id.* at 541. The Court determined in *Ex parte Bakelite* and *Williams* that the Court of Claims and the Court of Customs and Patent Appeals were Article I courts, and only later made Article III courts by Congress. *Id.* at 534. Thus, the Article III protections were not conferred upon appointment. *Id.*

<sup>132</sup> *Glidden*, 370 U.S. at 542–43.

<sup>133</sup> *Id.* at 550–51.

<sup>134</sup> *Id.* at 543; *see also* U.S. CONST. art. I, § 8, cl. 9.

and judges of the Court of Customs and Patent Appeals—to sit on “other” Article III courts did not violate the Constitution because both Article I courts and Article III courts are created pursuant to Article III.<sup>135</sup> The Court rejected the assumption that just “because an Article I body could adjudicate suits against the United States, such suits could not be simultaneously considered Article III cases.”<sup>136</sup>

The remainder of *Glidden* is divided into two sections determining whether the legislation that established (A) the Court of Claims and (B) the Court of Customs and Patent Appeals, complied with the limitations of Article III.<sup>137</sup> To determine this, the Court examined (1) the courts’ histories, (2) the development of their functions, and (3) the courts’ present characteristics.<sup>138</sup> For the Court of Claims, there were “substantial indications” in the legislative history that demonstrated Congress believed it was establishing an Article III court.<sup>139</sup> These indications were the ability to appeal its cases, previous cases that indicated the Supreme Court’s belief that the Court of Claims was an Article III court, and a statement made by President Lincoln that the court was created to remove its particular matters from “the Halls of Congress” to the Judicial Branch.<sup>140</sup>

As for the Court of Customs and Patent Appeals, the act under which the court was created was silent on the tenure of its judges, just as the Judiciary Act of 1798 had been silent on the matter.<sup>141</sup> Finally, the Court noted similarities between the Court of Customs and Patent Appeals, the Commerce Court, and the Emergency Court of Appeals (the latter two of which are Article III courts).<sup>142</sup> The most significant similarities between these courts were the circumstances that prompted the establishment of each.<sup>143</sup> These needs were:

[F]irst, the special competence in complex, technical and important matters that comes from narrowly focused inquiry; second, the speedy resolution of controversies available on a docket encumbered

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<sup>135</sup> REDISH, *supra* note 59, at 60–61.

<sup>136</sup> *Id.* at 61.

<sup>137</sup> *Glidden*, 370 U.S. at 552.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 553.

<sup>140</sup> *Id.* at 553–55.

<sup>141</sup> *Id.* at 558. *But see Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

<sup>142</sup> *Glidden*, 370 U.S. at 560.

<sup>143</sup> *Id.* at 560–61.

by other matters; and third, the certainty and definition that come from nationwide uniformity of decision.<sup>144</sup>

Ultimately, the Court held that both courts were Article III tribunals and that the judges for those courts, including retired judges, were Article III judges.<sup>145</sup> However, the Federal Courts Improvement Act of 1982 (FCIA) superseded the Court's decision in *Glidden*.<sup>146</sup> FICA gave the jurisdiction over direct access suits to the newly established United States Claims Court, an Article I court.<sup>147</sup>

### 3. *Crowell v. Benson*<sup>148</sup>

In *Crowell*, the Court considered whether a district court may grant a de novo hearing of a case originally heard by a deputy commissioner of the United States Employees' Compensation Commission and brought under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA").<sup>149</sup> Valid application of LHWCA turned on whether the deputy had jurisdiction over the matter.<sup>150</sup> The jurisdictional requirements under the act were (1) the locality of the injury and (2) the existence of a relationship between an employee and his or her employer.<sup>151</sup> Chief Justice Hughes, writing for the Court, noted that "there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries . . . within the purview of the act, the findings of the deputy commissioner . . . shall be final."<sup>152</sup> Further, "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."<sup>153</sup>

Chief Justice Hughes used language from *Murray's Lessee* and *Ex parte Bakelite*, to distinguish private and public rights.<sup>154</sup> Following this precedent, Chief Justice Hughes concluded that Congress may establish legislative courts

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<sup>144</sup> *Id.* at 560.

<sup>145</sup> *Id.* at 584.

<sup>146</sup> *See* *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990).

<sup>147</sup> *Id.*

<sup>148</sup> 285 U.S. 22 (1932).

<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 33.

<sup>151</sup> *Id.* at 62.

<sup>152</sup> *Id.* at 46.

<sup>153</sup> *Id.* (emphasis added).

<sup>154</sup> *Id.* at 50–51 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

when “the mode of determining” a particular class of matters is within congressional control.<sup>155</sup> Matters completely within congressional control include the governing of territories and D.C., as well as “matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it.”<sup>156</sup> Congress has complete control over the mode used to determine matters involving public rights, so Congress may delegate the adjudication of these matters to itself, the Executive Branch, or the Judicial Branch.<sup>157</sup>

The matters considered in *Crowell* were private rights, defined as “of the liability of one individual to another under the law.”<sup>158</sup> While Congress does not have complete control over the mode used to determine matters involving private rights, Congress is not restrained by any requirement that all subsequent “determinations of fact in constitutional courts” be made by judges.<sup>159</sup> The use of juries as fact finders, as required by the Constitution in particular cases, supports this statement.<sup>160</sup> Moreover, cases that do not require juries, such as those in equity or admiralty, typically have commissioners or assessors advise the court on certain classes of questions.<sup>161</sup> If the findings made by these advisors are based on evidence, “in the absence of errors of law,” then their reports were not to be disturbed.<sup>162</sup>

Article III mandates that the power of the judiciary extends to all cases of admiralty and maritime jurisdiction, but does not limit how the courts are to proceed in these cases.<sup>163</sup> As a result, Congress may control the “extent of the power as well as the mode of proceeding in which [admiralty and maritime] jurisdiction [was] to be exercised.”<sup>164</sup> However, Congress may not exercise

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<sup>155</sup> *Id.* at 50.

<sup>156</sup> *Id.* (quoting *Murray’s Lessee*, 59 U.S. (18 How.) 272).

<sup>157</sup> *Id.* at 50–51 (quoting *Ex parte Bakelite*, 279 U.S. 438). See discussion *infra* Part II.C.1 (discussing *Murray’s Lessee*, 59 U.S. (18 How.) 272).

<sup>158</sup> *Crowell*, 285 U.S. 22, 52 (1932).

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* at 51–52. Chief Justice Hughes provided other examples, including: “determinations of fact by boards and commissions created by the Congress to assist in its legislative process in governing various transactions subject to its authority, as for example, the rates and practices of interstate carriers.” *Id.* at 58.

<sup>161</sup> *Id.* at 51–52. The use of commissioners or assessors was typically done without the consent of the parties. *Id.* at 51.

<sup>162</sup> *Id.* at 51–52.

<sup>163</sup> *Id.* at 53.

<sup>164</sup> *Id.* However, Congress’s powers were limited when “amending and revising maritime law,” because Congress could not “reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.” *Id.* at 55. Consequently, the Court noted that “[u]nless the injuries to which the Act relates occur upon the navigable waters of the United States, [the case falls] outside that jurisdiction.” *Id.*

this control by substituting an agency for a court based simply on an agency's "utility and convenience."<sup>165</sup> When "fundamental rights are in question . . . the difference in security of judicial over administrative action," is significant.<sup>166</sup> Jurisdictional questions are questions in which fundamental rights, or constitutional rights, may be involved.<sup>167</sup> As a result, Chief Justice Hughes applied the constitutional avoidance doctrine.<sup>168</sup> Under the Court's analysis, the commissioner's decisions on jurisdictional facts were not final, but all other determinations of fact made by the commissioner acting "within his authority" were final.<sup>169</sup> The finality of these decisions did not violate the Constitution if based on evidence and if parties received "due notice, [and had a] proper opportunity to be heard."<sup>170</sup>

#### 4. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*<sup>171</sup>

The question before the Court in *Atlas Roofing* was whether Congress could create a new cause of action for "civil penalties enforceable in an administrative agency where there [was] no jury trial," without violating the Seventh Amendment.<sup>172</sup> In 1970, Congress instituted the Occupational Safety and Health Act ("OSHA"), in response to what it considered a "'drastic' national problem" of work-related deaths and injuries.<sup>173</sup> OSHA created two

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<sup>165</sup> *Id.* at 57. Chief Justice Hughes rejected the argument that within this particular act, Congress designated a single deputy commissioner as a fact-finding tribunal because, to accept that contention would "[make] the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence," regardless of whether a constitutional right was involved. *Id.* at 60–61. Read correctly, the statute had a "limited application" and consequently, the agency was "confined to its proper sphere." *Id.* at 65.

<sup>166</sup> *Id.* at 61. Though fact-finding has been delegated to juries, commissioners, and assessors, the actions of these fact-finders are under the "presence and superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside their verdict, if, in his opinion, it is against the law or the evidence." *Id.* (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899)). At least for juries, the twelve or so members of a jury are independent of the Legislative Branch in that they are not paid to render decisions, and serve only the length of one case. REDISH, *supra* note 59, at 75–76.

<sup>167</sup> See *Crowell*, 285 U.S. at 61–63.

<sup>168</sup> *Id.* at 63. Chief Justice Hughes summarized the constitutional avoidance doctrine as "[w]hen the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 62.

<sup>169</sup> *Id.* at 62–63.

<sup>170</sup> *Id.* at 63. Questions of jurisdiction are questions in which fundamental rights, or constitutional rights, may be involved. See *id.* at 61–63.

<sup>171</sup> 430 U.S. 442 (1977).

<sup>172</sup> *Id.* at 444.

<sup>173</sup> *Id.* (citing S. REP. 91-1282, at 2 (1970)).

remedies: (1) abatement orders requiring employers to correct unsafe working conditions; and, (2) the imposition of civil penalties on employers that maintained unsafe working conditions.<sup>174</sup> OSHA was not meant to affect the “existing state statutory and common-law remedies for actual injury and death.”<sup>175</sup>

*Atlas Roofing* argued that a government suit for civil penalties, for violation of OSHA, was a classic suit at common law.<sup>176</sup> If such suits were common law suits, then Congress’s assignment of jurisdiction to an administrative agency with no jury trial was unconstitutional.<sup>177</sup> The Court rejected this argument:

[T]he right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved . . . It created a new cause of action, and remedies [which were] unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar to the creation of the new rights or to their enforcement outside the regular courts of law.<sup>178</sup>

The Court’s conclusion was based on certain aspects of OSHA, including the stipulation that findings by the Commission—on questions of fact—were final, if supported by “substantial evidence on the record, considered as a whole,”<sup>179</sup> and a provision that provided for the enforcement of penalty payments, only available if the Secretary of Labor commenced a collection action in federal district court.<sup>180</sup> Furthermore, the meaning of the phrase “suits at common law,” within the Seventh Amendment was “construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which [a] jury trial was customary . . . .”<sup>181</sup> Suits of common law can be distinguished from statutory proceedings and rights.<sup>182</sup> Congress may grant legislative courts the power to enforce statutory rights “free from the strictures of the Seventh Amendment.”<sup>183</sup> Just as Congress can establish legislative courts to decide

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 449.

<sup>177</sup> *Id.* at 450.

<sup>178</sup> *Id.* at 460–61. *See also* *Palmore v. United States*, 411 U.S. 389 (1973) (holding that criminal defendants on trial in the District of Columbia did not have a constitutional right to an Article III court because the trial was authorized under Congress’s Article I power).

<sup>179</sup> *Atlas Roofing*, 430 U.S. at 446–47.

<sup>180</sup> *Id.* at 447.

<sup>181</sup> *Id.* at 449 (citing *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830)).

<sup>182</sup> *Id.* at 453–54 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937)).

<sup>183</sup> *Id.* at 454.

matters that arise between the government and others, Congress can create “new statutory ‘public rights.’”<sup>184</sup>

Justice White, writing for the majority, explained public rights are litigated in:

[C]ases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.<sup>185</sup>

Justice White did not cite any precedent for this definition. He distinguished these cases from those in *Crowell*, where “factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Article III court,” was acceptable when the issues involve only, or “purely,” private rights.<sup>186</sup> In this case, the issues did “not involve purely ‘private rights.’”<sup>187</sup>

If courts supply a cause of action and an adequate remedy to litigants in a matter, then the matter needs to go before a jury.<sup>188</sup> The Seventh Amendment “preserves” the right to a jury trial as it existed in 1789;<sup>189</sup> it was not meant to prevent Congress from creating “new public rights and remedies by statute,” or determining the appropriate enforcement mechanisms.<sup>190</sup> In this case, Congress, through OSHA, created a new cause of action with remedies unknown in common law.<sup>191</sup>

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<sup>184</sup> *Id.* at 455.

<sup>185</sup> *Id.* at 450.

<sup>186</sup> *Id.* at 450 n.7.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 458–59.

<sup>189</sup> *Id.* at 459.

<sup>190</sup> *Id.* at 460. Conceivably, a factor in the Court’s decision was that Congress determined that the common law remedies available for work-related injuries as a result of unsafe working conditions were inadequate. *Id.* at 461. Additionally, in these public rights cases, “[w]holly private tort, contract, and property cases, as well as a vast range of other cases as well as are not at all implicated.” *Id.* at 458.

<sup>191</sup> *Id.* at 461. For *Stern* factor (4)—*does it flow from a regulatory scheme*—Chief Justice Roberts cited *Atlas Roofing*. *Stern v. Marshall*, 131 S.Ct. 2594, 2613 (citing *Atlas Roofing*, 430 U.S. at 458). The citation refers to the line: “Our prior cases support administrative factfinding in only those situations involving ‘public rights,’ e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.” *Atlas Roofing*, 430 U.S. at 458. To regulate means “the act or process of controlling by rule or restriction.” BLACK’S LAW DICTIONARY 1398 (9th ed. 2009).



#### D. *The Bankruptcy Act of 1978*

The Bankruptcy Act of 1978 (the “Act”) was the culmination of ten years of work and compromise that included over 106 days of hearings, at least 130 witnesses, over 100 adopted amendments, several hundred written statements and comments, competing bills, and eight distinct drafts.<sup>192</sup> One of the greatest points of contention was whether Congress should give Article III status to bankruptcy judges.<sup>193</sup> The Act granted bankruptcy judges broad jurisdiction that enabled them to hear “virtually any matter arising in, or related to the bankruptcy case.”<sup>194</sup> Congress hoped that this vast jurisdictional system would be a significant improvement upon previous bankruptcy acts.<sup>195</sup>

Congress debated whether it had the power to establish an Article I court (rather than debating what the public rights framework for bankruptcy was, or what types of cases could be considered by Article I courts).<sup>196</sup> The House seemed aware of the possible repercussions for failing to give bankruptcy courts Article III court status.<sup>197</sup> Unfortunately, Congress’s concern about these repercussions conflicted with Congress’s desire for a system of bankruptcy courts that would expedite bankruptcy cases and prevent the dilution of Article III court status.<sup>198</sup>

Chairman of the Committee on the Judiciary, Representative Peter Rodino, Jr., asked several constitutional experts questions regarding two versions of the proposed bill.<sup>199</sup> The most pertinent of these questions were: “What is the constitutional status of the described courts . . . ?” and “May . . . the courts described exercise the full jurisdiction described?”<sup>200</sup> While the responses

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<sup>192</sup> See Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941 (1979).

<sup>193</sup> Tabb, *supra* note 83, at 34.

<sup>194</sup> *Id.* Bankruptcy judges had all the “powers of a court of equity, law, and admiralty,” except for the power to enjoin another court, or punish a criminal for contempt not committed in their presence. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 (1982) (plurality opinion).

<sup>195</sup> Tabb, *supra* note 83, at 34.

<sup>196</sup> *Id.* at 34–35.

<sup>197</sup> Klee, *supra* note 192.

<sup>198</sup> See *id.*

<sup>199</sup> See *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 2682–2706 (1976) [hereinafter *Bankruptcy Act Revision*].

<sup>200</sup> *Id.* at 2683. Representative Rodino described the proposed jurisdiction as:

[B]roader than that presently exercised by district courts sitting in bankruptcy and by referees in bankruptcy . . . the present distinction between summary and plenary jurisdiction of the referee, based on possession of property by the debtor or trustee . . . would be abolished . . . all actions related to a bankrupt estate would be tried in the new bankrupt court . . . [T]he new bankruptcy

expressed no consensus as to the constitutionality of the jurisdiction granted to the courts in each bill, there was a consensus that the courts, if established, were controlled by Article I.<sup>201</sup> One respondent wrote that the courts “would be Article I courts [and in his view] there [was] no doubt of the power of Congress to establish such courts.”<sup>202</sup> Still, another respondent wrote: “It seems pretty clear to me that the proposed bankruptcy courts would indeed be exercising the judicial power of the United States and would have to be constituted in accordance with the requirements of Article III.”<sup>203</sup> Of the eleven responses recorded, not a single constitutional expert mentioned the public rights doctrine.<sup>204</sup>

According to the House Judiciary Committee, if bankruptcy courts were not given Article III status, it would “raise serious constitutional doubts” to grant bankruptcy courts all powers necessary for an efficient bankruptcy system such as the power to enjoin other courts and contempt powers.<sup>205</sup> The Senate opposed granting bankruptcy judges Article III status, advocating

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court would be given all powers, judicial in nature, necessary to carry out its responsibilities, including the power to cite and punish contempts, to hold jury trials, to enjoin other courts and proceedings in them, and to enter judgment and issue writs of execution.

*Id.* at 2682 (internal citations omitted). Furthermore, judges would be removable for incapacity, misconduct, or neglect of duty and would be appointed by the President, to serve fifteen-year terms. *Id.*

<sup>201</sup> *See id.*

<sup>202</sup> *Id.* at 2685 (letter of Erwin N. Griswold, Jones Day, Reavis & Pogue) (quoting *Ex Parte Bakelite*, 279 U.S. 438, 449 (1929)). Mr. Griswold based this belief on *Ex parte Bakelite Corp.*, which he quoted:

It long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with power in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution.

*Id.* at 2687.

<sup>203</sup> *Id.* at 2684 (letter of Brice M. Clagett, Covington & Burling LLP).

<sup>204</sup> *See id.* Congress considered two interpretations of the Court’s decision in *Crowell*. *Id.* at 2697 (letter of Terrance Sandalow, Professor of Law, University of Michigan). The first interpretation authorized an administrative agency to decide workmen’s compensation claims, subject to judicial review, even though this meant the agency was empowered to adjudicate claims involving private rights. *Id.* at 2698. Under this first interpretation the Court’s decision rested on the fact that issues of law were subject to review in an Article III court. *Id.* If Congress chose to follow the first interpretation, then Congress could create Article I bankruptcy courts as long as the decisions made by these courts were subject to judicial review in an Article III court. *Id.* The second interpretation was a more narrow reading of the Court’s decision under which the legislation was sustained because the agency in *Crowell* “was not authorized to exercise the full range of powers traditionally associated with ‘the judicial power.’” *Id.* If Congress chose to follow this second interpretation, it could create bankruptcy courts as long as these courts were not given this full range of judicial powers. *Id.*; *see also supra* Part II.C.3 (discussing the facts of *Crowell v. Benson*, 285 U.S. 22 (1932)).

<sup>205</sup> H.R. REP. NO. 95-595, at 1, 7, 12 (1977).

instead that bankruptcy courts be made adjuncts of the district courts.<sup>206</sup> Much of the Senate's argument focused on recommendations made by the Judicial Conference,<sup>207</sup> which believed that any changes should be made through the existing system.<sup>208</sup> Chief Justice Burger, as head of the Judicial Conference, strongly objected to the elevation of bankruptcy judges to Article III status.<sup>209</sup> The Chief Justice spoke individually with Senators and with the President about opposing the final version of the bill.<sup>210</sup> The Judicial Conference's insistence that Congress's goal could be achieved without giving bankruptcy judges Article III status likely assuaged Congress's constitutional doubts.

*E. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>211</sup>

Four years after its enactment, the Supreme Court found the Act unconstitutional in *Northern Pipeline*.<sup>212</sup> Northern Pipeline filed for reorganization and later filed suit in the bankruptcy court against Marathon Pipeline for damages that resulted from alleged breach of contract and warranties, misrepresentation, coercion, and duress.<sup>213</sup> Marathon Pipeline moved to dismiss the suit on grounds that the Act "unconstitutionally conferred [Article] III judicial power upon judges who lacked life tenure and protection against salary diminution."<sup>214</sup> The bankruptcy judge denied the motion, but this judgment was reversed on appeal when the district court found that "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try

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<sup>206</sup> See *Bankruptcy Act Revision*, *supra* note 199, at 367 (statement on behalf of the Ad Hoc Comm. on Bankr. Legislation of the Judicial Conference of the United States).

<sup>207</sup> See 28 U.S.C. § 331 (2006) (creating and describing the role of the Judicial Conference of the United States).

<sup>208</sup> See *Bankruptcy Act Revision*, *supra* note 199, at 368.

<sup>209</sup> Klee, *supra* note 192, at 954.

<sup>210</sup> *Id.* at 954, 956. The Chief Justice has authority to transmit to Congress and the President the recommendations of the Judicial Conference relating to legislation. *Id.* (explaining that while Title 28 U.S.C. § 331 (1976) authorizes the Chief Justice to make recommendations to Congress about legislation, but it does not have an "express authorization . . . to transmit recommendations for legislation to the President."); see also Ruggeri J. Aldisert, The Judicial Conference and the New Bankruptcy Act, 65 A.B.A. J. 229 (Feb. 1979) (chastising Professor Klee for suggesting that the Chief Justice violated separation of powers when he attempted to influence Congress and the President about the 1978 Act). On October 17, 1978, by unanimous vote, the Judicial Conference, rather than the Chief Justice acting alone, urged the President to veto the bill. Ruggero J. Aldisert, *The Judicial Conference and the New Bankruptcy Act*, 65 A.B.A. J. 229 (Feb. 1979).

<sup>211</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>212</sup> *Id.* (plurality opinion).

<sup>213</sup> *Id.* at 56.

<sup>214</sup> *Id.* at 56–57.

cases which [were] otherwise relegated under the Constitution to Article III judges was unconstitutional.”<sup>215</sup>

The case then went to the Supreme Court. The plurality opinion, written by Justice Brennan, emphasized the importance of an independent judiciary and the system of checks and balances.<sup>216</sup> Justice Brennan explained that the framers of the Constitution sought to prevent tyranny or the accumulation of legislative, judicial, or executive powers in “the same hands, whether of one, a few, or many.”<sup>217</sup> In so doing, the framers settled on what became Article III, Section 1 of the Constitution, which provides that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>218</sup> Section 1 requires that judges serving in these courts have life tenure, are subject to removal from office only by impeachment, and receive undiminished compensation while in office.<sup>219</sup> Justice Brennan wrote: “our Constitution unambiguously enunciates a fundamental principle—that the ‘judicial Power of the United States’ must be reposed in an independent Judiciary [and that it] commands that the independence of the Judiciary be jealously guarded.”<sup>220</sup> The appointment of bankruptcy judges under the Act clearly did not comport with these requirements.<sup>221</sup> Rather than enjoying life tenure, bankruptcy judges were only appointed for fourteen-year terms and could be removed from office for incompetency, misconduct, neglect of duty, or physical or mental disability.<sup>222</sup> Congress could also diminish bankruptcy judges’ salaries.<sup>223</sup>

Northern Pipeline claimed that the Act was constitutional, for two reasons.<sup>224</sup> First, Congress may establish legislative courts with jurisdiction to

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<sup>215</sup> *Id.* at 57.

<sup>216</sup> *Id.* at 58–60 (citing *United States v. Will*, 449 U.S. 200, 217–20 (1989); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); *O’Donoghue v. United States*, 289 U.S. 516, 531 (1933)).

<sup>217</sup> *Id.* at 57 (quoting *THE FEDERALIST* NO. 47 (James Madison) (H. Lodge ed., 1888)).

<sup>218</sup> *Id.* at 58–59 (quoting U.S. CONST. art. III, § 1).

<sup>219</sup> *Id.* The Compensation Clause is significant because “a power over a man’s subsistence” is tantamount to “a power over his will,” and thus without it, an independent judiciary could not be maintained. *Id.* at 60 (quoting *THE FEDERALIST* NO. 79, at 491 (Alexander Hamilton) (H. Lodge ed., 1888)).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 60–61.

<sup>223</sup> *Id.* at 61.

<sup>224</sup> *Id.* at 62.

decide cases to which the Article III judicial power extends.<sup>225</sup> Second, Northern Pipeline argued that “even if the Constitution does require that this bankruptcy-related action be adjudicated in an Article III court, the Act in fact satisfies that requirement,” because bankruptcy courts were adjuncts of the district courts.<sup>226</sup> To defend this argument, Northern Pipeline relied on *Murray’s Lessee*.

Northern Pipeline argued that Congress could create legislative courts pursuant to only specific Article I powers, “when there [was] a particularized need for distinctive treatment.”<sup>227</sup> Justice Brennan characterized this limitation as more illusory than real, because the broad range of questions that could be brought in bankruptcy court demonstrated that Congress, acting through a “specialized” court and “pursuant to only one of its many [Article] I powers,” could erode Article III court jurisdiction.<sup>228</sup> Precedent, particularly *Crowell*, stood for the proposition that congressional grants of power to an agency were only tolerable when that agency’s jurisdiction was limited to “specialized, narrowly confined factual determinations regarding a *particularized area of law*.”<sup>229</sup>

Justice Brennan then dismissed Northern Pipeline’s second argument—that bankruptcy courts were adjuncts of the district court—and its interpretation of precedent, particularly, *Murray’s Lessee*:

[W]hen properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the

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<sup>225</sup> *Id.* at 62, 63 n.14 (quoting *Palmore v. United States*, 411 U.S. 389, 408 (1973) (“the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in specialized areas having particularized needs and warranting distinctive treatment.”)).

<sup>226</sup> *Id.* at 62–63.

<sup>227</sup> *Id.* at 73–74.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 84–85 (1982) (plurality opinion) (emphasis added). In addition to contrasting the administrative agency at issue *Crowell* from bankruptcy courts because the agency was limited to a particularized area of law, Justice Brennan contrasted the agency in *Crowell* to the bankruptcy courts under the Act of 1978. Through this comparison Justice Brennan enumerated four additional factors to advance the conclusion that the grant to bankruptcy courts was unconstitutional: 1) the agency engaged in a narrow, statutorily defined fact-finding while the bankruptcy courts exercise all jurisdiction given to district courts; 2) the agency had power to issue only compensation orders, whereas bankruptcy courts had all the powers of district courts; 3) bankruptcy courts judgments were subject to more deference than the agency; and 4) the agency had to seek enforcement orders in district court, whereas bankruptcy courts issued final judgments. *Id.* at 85–86 (citations omitted).

Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power “to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.”<sup>230</sup>

These three narrow situations are: (1) cases in military courts; (2) cases in courts that lie exclusively outside the States of the Federal Union, including the territories and D.C.; and (3) cases included within the doctrine of public rights.<sup>231</sup> The plurality limited the doctrine of public rights to cases in which the federal government was a party and “only to matters that historically could have been determined exclusively by” the executive and legislative branches.<sup>232</sup> Therefore, the substantive legal rights in this case—contract rights—were not public rights.<sup>233</sup> The establishment of bankruptcy courts with “jurisdiction over all matters related to those arising under the bankruptcy laws” did not fall into one of the three recognized situations.<sup>234</sup> Justice Brennan asserted that “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages . . . . The former may well be a ‘public right,’ but the latter obviously

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<sup>230</sup> *Id.* at 63–64.

<sup>231</sup> *Id.* at 65–67. *See also* *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (explaining that Congress may establish legislative courts “which are to form part of the government of territories, or of the District of Columbia, or to serve as special tribunals ‘to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.’”).

<sup>232</sup> *N. Pipeline*, 458 U.S. at 68 (plurality opinion).

<sup>233</sup> *Id.* at 71. The *Northern Pipeline* decision seems logical in its definition of public rights as those that “at a minimum arise ‘between the government and others’” because it closely follows the example of *Murray’s Lessee*. *See id.* at 70 (citing *Crowell*, 285 U.S. at 50; *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). However, Justice Brennan’s argument for this definition—that it was established to aid in the preservation of the separation of powers—is illogical. *See N. Pipeline*, 458 U.S. at 93 (White, J., dissenting). The difficulties with his argument are apparent when compared against Article III which specifically mandates that the judiciary power extends to “[c]ontroversies to which the United States shall be a party.” U.S. CONST. art. III, § 2, cl. 1; *see also* REDISH, *supra* note 59, at 58–76. The same problem arises in the later Supreme Court cases, *Thomas* and *Schor*, in which Justice O’Connor (writing for the majority in each) stated that “public rights,” which do not have to be adjudicated in an Article III court, are those which are “so closely intertwined” with a federal statute. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986). Her analysis closely resembles Article III, in that the judicial power was meant to extend to all cases “arising under . . . the Laws of the United States.” U.S. CONST. art. III, § 2, cl. 1.

<sup>234</sup> *N. Pipeline*, 458 U.S. at 76 (plurality opinion).

is not.”<sup>235</sup> Consequently, the broad grant of jurisdiction in the Act was unconstitutional.<sup>236</sup>

*F. Bankruptcy Courts and the Federal Judgeship Act of 1984*

After *Northern Pipeline*, Congress again grappled with whether to grant Article III authority and protections to bankruptcy judges.<sup>237</sup> Just as before, the House favored conferring Article III power to bankruptcy judges and the Senate stubbornly opposed.<sup>238</sup> Congress finally decided bankruptcy courts would be units of the federal district courts and distinguished between core and non-core proceedings to limit the jurisdiction of the bankruptcy courts.<sup>239</sup> Bankruptcy courts could hear and enter final judgments as to core proceedings, but were merely fact finders subject to de novo review by the district courts for non-core matters.<sup>240</sup> Congress enumerated sixteen core proceedings in 28 U.S.C. § 157(b)(2).<sup>241</sup>

Congress took over a year to respond to the Supreme Court’s decision in *Northern Pipeline*. Once Congress responded, it approached the same problems as it had before enacting the Act in 1978.<sup>242</sup> The Senate Judiciary Committee published a report<sup>243</sup> discussing *Northern Pipeline*’s pronouncement of the Act’s unconstitutionality, a history of bankruptcy laws, and the Senate’s proposed bill.<sup>244</sup> Notwithstanding the depth and reasoning in the Committee’s report, the report only mentions “public rights” within its summary of the *Northern Pipeline* decision.<sup>245</sup> The report espoused the Committee’s view that bankruptcy judges should not be given Article III status. The Committee believed that giving bankruptcy judges Article III status would delay implementation of the Act; significantly increase the number of Article III judges (in turn, diluting their significance); and ultimately reduce

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<sup>235</sup> *Id.* at 71.

<sup>236</sup> *Id.* at 87–88. The Court concluded that Congress could not merely “remove the jurisdiction” and leave the rest of the bankruptcy system intact. *Id.* at 87 n.40.

<sup>237</sup> Tabb, *supra* note 83, at 39.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> 28 U.S.C. § 157(b)(2) (2006).

<sup>242</sup> *See supra* Part II.D.

<sup>243</sup> Bankruptcy Court and Federal Judgeship Act (To Accompany S. 1013), S. REP. NO. 98-55 (1983).

<sup>244</sup> *See generally id.* (indicating that S. 1013 gave district courts greater control over bankruptcy courts and the effect on state law matters).

<sup>245</sup> *Id.* at 9.

Congress's flexibility, thereby affecting the overall workability of the system.<sup>246</sup>

The National Bankruptcy Conference ("NBC"),<sup>247</sup> in a statement prepared for the House, stated that the plurality in *Northern Pipeline* indicated constitutional objections were unlikely to "extend to efforts authoriz[ing] Article I courts to enforce 'Congressionally created rights,' or 'public rights.'"<sup>248</sup> Private rights, on the other hand, were defined here as "rights created by state law."<sup>249</sup> In another statement prepared for the House, U.S. Bankruptcy Judge Ralph H. Kelley emphasized the enormous inclusion of state law issues in bankruptcy, all of which could be considered private rights.<sup>250</sup> Judge Kelley strongly asserted his belief that Congress should grant bankruptcy courts Article III status because without such status, the entire bankruptcy system would be "slow, clumsy, costly, and of doubtful legality."<sup>251</sup>

The House Judiciary Committee prepared the Report on the Bankruptcy Court Act of 1982 in which it asserted that, "[t]he adjustment of debtor-creditor relations does not involve public rights, because generally the contest is solely among private litigants."<sup>252</sup> Accordingly, the essence of bankruptcy litigation was "the determination of disputes between private parties grounded in state law."<sup>253</sup> The Report also quoted then-Assistant Attorney General Jonathan C. Rose, who stated that "many of the functions of the bankruptcy court require bankruptcy judges to adjudicate questions of private civil law; however, it is doubtful whether a bankruptcy court could efficiently adjudicate" a case unless bankruptcy judges are given the power to hear those

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<sup>246</sup> *Id.* at 30–32.

<sup>247</sup> A group of leading bankruptcy scholars and practitioners who serve as a resource to Congress on major bankruptcy legislation. *Our Mission*, NATIONAL BANKRUPTCY CONFERENCE, <http://www.nationalbankruptcyconference.org/mission.cfm> (last visited Nov. 8, 2012).

<sup>248</sup> *See Bankruptcy Court Act of 1983: Hearings on H.R. 3 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 98th Cong. 185 (1983) (statement of National Bankruptcy Conference in Opposition to Proposed Judicial Conference Rule).

<sup>249</sup> *See id.*

<sup>250</sup> *Id.* at 195. (statement of J. Ralph H. Kelley, United States Bankruptcy Court for the Eastern District of Tennessee) ("Let me assure you that approximately five thousand of [ten thousand] hearings [heard in his court] involved the adjudication of state law issues between private litigants in matters arising in or related to title 11 cases.").

<sup>251</sup> *See id.* at 196.

<sup>252</sup> *See H.R. REP. NO. 97-807*, at 6 (1982). *But see* discussion *supra* Part II.E. (discussing *N. Pipeline Constr. Co. v. Marathon Pipe Line, Co.*, 458 U.S. 50 (1982)).

<sup>253</sup> *See H.R. REP. NO. 97-807*, at 6 (1982).



matters.<sup>254</sup> The Report contained no other discussion of public rights.<sup>255</sup> The then-Assistant Attorney General Rose also submitted his own statement to Congress wherein he suggested that though “some aspects” of bankruptcy concern “public right[s],” the majority of issues in bankruptcy proceedings involve “private rights of the parties.”<sup>256</sup>

Professor Martin H. Redish discussed the public versus private rights dichotomy before the Senate Judiciary Committee.<sup>257</sup> The thrust of his statements was that the dichotomy was an illogical conclusion by Justice Brennan, rather than an analysis of what would necessarily constitute a “private,” or a “public” right.<sup>258</sup> Professor Redish provided Congress with what he believed were the only options to solve the bankruptcy dilemma.<sup>259</sup> Of the five options provided, only one fits within the public and private rights scheme.<sup>260</sup> But rather than mentioning public rights, Professor Redish suggested that Congress keep the bankruptcy courts as Article I courts, and “remove from [their] jurisdiction to adjudicate all *state common law claims* involving the bankrupt,” and give that jurisdiction to the federal district courts.<sup>261</sup>

### *G. Interpretations of Public Rights since Northern Pipeline*

#### *1. Thomas v. Union Carbide Agricultural Products*<sup>262</sup>

The Supreme Court in *Thomas* considered “whether Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review . . . for resolving disputes among participants in [the Federal Insecticide, Fungicide, and Rodenticide Act’s (“FIFRA”)] pesticide registration scheme.”<sup>263</sup> Union Carbide asserted that Congress transgressed the limitations of Article III when it allocated judicial powers to arbitrators

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<sup>254</sup> *Id.* at 17.

<sup>255</sup> *See id.*

<sup>256</sup> *See Manville Bankruptcy and the Northern Pipeline Decision: Hearings Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 97th Cong. 209 (1982) (statement of Jonathan C. Rose, Assistant Att’y Gen. of the United States).

<sup>257</sup> *See Northern Pipeline Bankruptcy Decision, Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 307 (1982) (testimony of Professor Martin H. Redish, Northwestern University School of Law).

<sup>258</sup> *See id.* at 307–08.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 319.

<sup>261</sup> *Id.* (emphasis added).

<sup>262</sup> 473 U.S. 568 (1986).

<sup>263</sup> *Id.* at 571.

resolving compensation disputes among FIFRA registrants.<sup>264</sup> According to Union Carbide, Congress could not require the use of arbitration for disputes among registrants under FIFRA without also providing for review of the arbitrators' decisions by Article III courts.<sup>265</sup>

Writing for the Court, Justice O'Connor emphasized the Court's long-standing recognition of Congress's power under Article I "to vest decision-making authority in tribunals that lack the attributes of Article III courts."<sup>266</sup> Justice O'Connor also noted that many cases involving private interests are decided by agencies "with limited or no [judicial] review by Article III courts."<sup>267</sup> According to Justice O'Connor, the plurality only restrained Congress from vesting the power to adjudicate and issue binding orders in cases involving state contract law without prior consent of the litigants, even when the orders were subject to appellate review in Article III courts.<sup>268</sup>

Union Carbide contended that FIFRA conferred a private right to compensation, which required Article III court adjudication or review, an argument based on the distinction between public and private rights drawn by the plurality in *Northern Pipeline*.<sup>269</sup> Private rights, as defined in *Northern Pipeline*, included "the liability of one individual to another under the law as defined."<sup>270</sup> Public rights were "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."<sup>271</sup> However, because the *Northern Pipeline* decision did not command a majority of the Court, its theory on the public versus private rights dichotomy—in so much as it was a bright-line test—was not binding precedent.<sup>272</sup> Therefore, the *Thomas* Court held that "practical attention to substance rather than doctrinaire reliance on formal categories should inform [the] application of Article III."<sup>273</sup>

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<sup>264</sup> *Id.* at 576. Appellees were thirteen firms that engaged in developing and marketing chemicals used to make pesticides. For simplicity, I will refer to appellees "Union Carbide."

<sup>265</sup> *Id.* at 582–83.

<sup>266</sup> *Id.* at 583.

<sup>267</sup> *Id.* These cases provided for D.C. Courts, the Deputy Commissioner of Employees' Compensation Committee, and treasury accounting officers, among others.

<sup>268</sup> *Id.* at 584. According to Justice O'Connor, in *Northern Pipeline*, Justice Brennan noted "that discharge in bankruptcy, which adjusts liabilities between individuals, is arguably a public right." *Id.* at 586.

<sup>269</sup> *Id.* at 585.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982) (plurality opinion)).

<sup>272</sup> *Id.* at 586.

<sup>273</sup> *Id.* at 587.

The Court decidedly rejected *Northern Pipeline's* (and *Crowell's*) definition of public rights cases as those between the government and an individual.<sup>274</sup>

Nonetheless, certain substantive aspects of FIFRA did not infringe upon Article III. Most significant was that the right created by FIFRA had more characteristics in common with a public right than a private right.<sup>275</sup> Two of these characteristics highlighted Congress's powers: first, "to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing [for] Article III adjudication;"<sup>276</sup> and second, "to condition issuance of registrations or licenses on compliance with agency procedures."<sup>277</sup> The last characteristic indicating the matter was more of a public right was that the "[u]se of a registrant's data to support a follow-on registration serve[d] a public purpose" as "an integral part of a program" meant to safeguard public health.<sup>278</sup>

Congress did not "diminish the likelihood of impartial decision-making, free from political influence" when it gave civilian arbitrators—selected by agreement among the parties or appointed on a case by case basis by an independent federal agency—the power to fix the amount of compensation for follow-on registrants under FIFRA.<sup>279</sup> In delegating this authority, Congress was apparently motivated by the "near disaster of the FIFRA 1972 amendments" and the threat to public health caused by delayed pesticide registration.<sup>280</sup> Finally, FIFRA's allocation of powers to arbitrators was not absolute, and so it did not preclude review by Article III courts.<sup>281</sup> The Court concluded that FIFRA did not violate the constitution, but:

[the] holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a *seemingly "private" right that is so closely integrated into a public regulatory scheme* as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.<sup>282</sup>

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<sup>274</sup> *Id.* at 589.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 590.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 592.

<sup>282</sup> *Id.* at 593–94 (emphasis added). Other relevant language throughout the opinion is: "For purposes of compensation under FIFRA's regulatory scheme, however, it is the 'mandatory licensing provision' that

## 2. Commodity Futures Trading Commission v. Schor<sup>283</sup>

Only one year later, the Supreme Court addressed another issue concerning public rights and, again, Justice O'Connor wrote for the majority.<sup>284</sup> In *Schor*, the question before the Court was whether the Commodity Exchange Act ("CEA") granted the Commodity Futures Trading Commission ("CFTC") the power to consider and make determinations on state law counterclaims in reparation proceedings and if so, whether that grant violated Article III.<sup>285</sup> The CEA permitted individuals (complainants) injured by professional commodities brokers to apply to the CFTC for an order commanding the offending broker to pay reparations.<sup>286</sup> The complainant could then, if needed, seek enforcement of the order in federal district court.<sup>287</sup>

In this case, Schor filed complaints against ContiCommodity Services ("Conti").<sup>288</sup> Conti counterclaimed, alleging Schor was indebted to Conti.<sup>289</sup> The Administrative Law Judge ("ALJ") in the reparations proceeding in the CFTC found in favor of both Schor's claims and Conti's counterclaims.<sup>290</sup> After this decision, Schor challenged the statutory authority of the CFTC to hear Conti's counterclaims but was unsuccessful with this argument before the ALJ.<sup>291</sup> Schor appealed to the D.C. Circuit, which noted: "[T]he CFTC's exercise of jurisdiction over Conti's common law counterclaim gave rise to '[s]erious constitutional problems' under *Northern Pipeline*."<sup>292</sup> So, the court read the CEA to preclude these problems.<sup>293</sup> Under this construction, the CFTC

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creates the relationship between the data submitter and the follow-on registrant, and *federal law supplies the rule of decision*." *Id.* at 585 (emphasis added). Public rights "reflect simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters 'that could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Id.* at 589 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 55, 68 (1982) (plurality opinion)) (emphasis added). Also: "To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for *dealing with a class of questions of fact . . . peculiarly suited to examination and determination by an administrative agency specially assigned to that task*." *Id.* at 590. (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)) (emphasis added).

<sup>283</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

<sup>284</sup> *Id.* at 835.

<sup>285</sup> *Id.* at 835–36.

<sup>286</sup> *Id.* at 836.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 837.

<sup>289</sup> *Id.* at 837–38.

<sup>290</sup> *Id.* at 838.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 839.

<sup>293</sup> *Id.*

could only hear counterclaims that alleged either a violation of the CEA or other CFTC regulations.<sup>294</sup> Conti's counterclaims alleged neither, and thus the "CFTC exceeded its authority" as to these claims, which the court dismissed.<sup>295</sup>

The court of appeals erred when it read the CEA to preclude considering the constitutional issue.<sup>296</sup> The Supreme Court found that "Congress plainly intended" for the CFTC to have jurisdiction over such counterclaims.<sup>297</sup> Subsequently, the Court had to answer, "whether the CFTC's assumption of jurisdiction over common law counterclaims [violated] Article III of the Constitution."<sup>298</sup> Whether Congress may constitutionally create Article I courts turns on the particular adjudicative functions given to these courts.<sup>299</sup> These "adjudicative functions . . . must be assessed by reference to the purposes underlying the requirements of Article III."<sup>300</sup>

Here, the powers of the CFTC did not violate Article III because its powers only departed from "the traditional agency model" in one respect—jurisdiction over common law counterclaims.<sup>301</sup> This deviation did not make the congressional scheme unconstitutional.<sup>302</sup> Justice O'Connor wrote:

[T]he CFTC's assertion of counterclaim jurisdiction is limited to that which is *necessary to make the reparations procedure workable . . .* The CFTC adjudication of common law counterclaims is *incidental to*, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence *as the reparations claim*.<sup>303</sup>

The Court declined to "endorse an absolute prohibition" on ancillary jurisdiction in "the agency context."<sup>304</sup> In support of this, Justice O'Connor noted precedent wherein the Court upheld the adjudication of state law claims

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 839–40.

<sup>296</sup> *Id.* at 841.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 847.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion)).

<sup>301</sup> *Id.* at 852 (emphasis added).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 856 (emphasis added).

<sup>304</sup> *Id.* at 852.

in federal agencies subject to judicial review “when [the] claim was ancillary to a federal law dispute.”<sup>305</sup> Ancillary jurisdiction is “[a] court’s jurisdiction to adjudicate claims and proceedings related to a claim properly before the court.”<sup>306</sup> Additionally, Justice O’Connor indicated a transaction test may be useful when determining proper jurisdiction of counterclaims—in that jurisdiction may be proper if the counterclaim arises from the same transaction as its original claim (for which jurisdiction is not questioned).<sup>307</sup>

Important in the Court’s analysis was that the CFTC dealt only with a “particularized area of law,” as opposed to the broad grant of powers to bankruptcy courts in the Act addressed in *Northern Pipeline*.<sup>308</sup> Also important was the fact that the orders issued by the CFTC were only enforceable by a district court—again, unlike the powers granted to bankruptcy courts under the Act.<sup>309</sup> The review of CFTC orders was also more stringent than the review of bankruptcy court orders.<sup>310</sup> The Court was “persuaded that the Congressional [grant] of limited CFTC jurisdiction over a narrow class of common law claims as incident to the CFTC’s primary and, unchallenged, adjudicative function” did not substantially threaten the separation of powers among the branches.<sup>311</sup> The Court weighed the (1) the amount of judicial control left for federal courts; (2) congressional purpose for the jurisdictional grant; (3) the demonstrated need for the jurisdictional grant; and (4) the limited nature of the jurisdictional grant.<sup>312</sup> Since Congress did not intend for the CFTC to encroach upon the federal courts but only “intended [the CFTC] to create an inexpensive and expeditious alternative forum” following “a specific and limited federal regulatory scheme,” the CFTC’s assertion of counterclaim jurisdiction was

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<sup>305</sup> *Id.*

<sup>306</sup> BLACK’S LAW DICTIONARY 928 (9th ed. 2009) (Giving the example: “if a plaintiff brings a lawsuit in federal court based on a federal question (such as a claim under Title VII), the defendant may assert a counterclaim over which the court would not otherwise have jurisdiction (such as a state-law claim of stealing company property)”).

<sup>307</sup> *Schor*, 478 U.S. at 852 (discussing *Katchen v. Landy*, 382 U.S. 323 (1966), in which the Court upheld the power of a bankruptcy referee to “hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction.”).

<sup>308</sup> *Id.* at 852–53 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (plurality opinion)) (emphasis added).

<sup>309</sup> *See id.* at 853.

<sup>310</sup> *Id.* Rather than the “clearly erroneous” standard, the record was reviewed with the “weight of the evidence” standard (essentially, de novo review). Consequently, the *Schor* decision was an unnecessary exercise because of the low deferential standard used to review orders by the commission. *Id.*

<sup>311</sup> *Id.* at 854.

<sup>312</sup> *Id.* at 855.

only a *de minimis* intrusion on the other branches and thus was not unconstitutional.<sup>313</sup>

In future cases, “due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.”<sup>314</sup> *Crowell* and *Thomas* influenced this decision.<sup>315</sup> These cases advised against striking down legislation that provides a way to “[deal] with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specifically assigned to that task,” and further admonished that “bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries.”<sup>316</sup>

### 3. *Granfinanciera, S.A. v. Nordberg*<sup>317</sup>

In *Granfinanciera*, whether a matter was a “public right” was not the primary inquiry; rather, the primary inquiry was whether a party who had “not submitted a claim against a bankruptcy estate [had] a right to a jury trial when sued by the trustee . . . to recover an allegedly fraudulent [conveyance].”<sup>318</sup> However, if a matter was a public right Congress could assign the adjudication of the matter to an Article I court—with which juries were incompatible—without violating the Constitution.<sup>319</sup> Therefore, whether a matter is a public right is key to whether the parties have the right to a jury trial.<sup>320</sup> Ultimately, the Court held that even though Congress designated fraudulent conveyance actions as a core proceeding in the bankruptcy statute, the Seventh Amendment entitled “such a person to a trial by jury.”<sup>321</sup> Justice Brennan set out a two-step analysis: (1) a comparison of the statutory action to eighteenth century actions brought in the courts of England prior to the merger of courts of law and equity; and (2) an examination of the remedy sought and a

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<sup>313</sup> *Id.* Also important to the Court was the expertise of the Commission in applying the CEA and other CFTC regulations. *Id.* at 856.

<sup>314</sup> *Id.* at 857.

<sup>315</sup> *See id.* at 856–57.

<sup>316</sup> *See id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)) (emphasis added); *see also* discussion *supra* Part II.G.1. (discussing the rejection of a bright-line rule for public versus private rights).

<sup>317</sup> 492 U.S. 33, 36 (1989).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 53–54.

<sup>320</sup> *Id.* at 54.

<sup>321</sup> *Id.*

determination of whether it is legal or equitable in nature.<sup>322</sup> If the result of the this two-step analysis “indicate[d] that a party [was] entitled to a jury trial under the Seventh Amendment,” then Court must decide “whether Congress may assign and has assigned [the] resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury.”<sup>323</sup>

Justice Brennan, in applying the first step of the two-step analysis, stated that “there [was] no dispute” that actions brought alleging “preferential or fraudulent transfers,” were brought in the courts of law in England in the eighteenth century.<sup>324</sup> Previous case law held that “[w]here an action is simply for the recovery . . . of a money judgment, the action is one at law.”<sup>325</sup> Though prior to the Act a suit for the recovery of a preference was not a proceeding in bankruptcy, fraudulent conveyance actions and actions brought to recover preferences were brought by trustees in bankruptcy in separate plenary suits, “to which the Seventh Amendment applied.”<sup>326</sup> Justice Brennan maintained that the issue raised in *Granfinanciera* had nothing to do with whether bankruptcy courts could conduct jury trials regarding fraudulent conveyances.<sup>327</sup> Rather, the issue was whether the Seventh Amendment protected the right to a jury trial despite Congress’s decision to allow non-Article III courts the power to adjudicate such claims.<sup>328</sup> Here, Justice Brennan’s comparison of the statutory action to eighteenth century actions brought in the courts of England and his examination of the remedy sought indicated that the parties were entitled to a jury trial.

Congress may deny parties their right to a jury trial when the particular action is a public right and assign the adjudication of the action to an Article I

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<sup>322</sup> See *id.* at 42. The second step of this analysis was said to be more important than the first. *Id.* (citing *Tull v. United States*, 481 U.S. 412, 421 (1987)).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 43 (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932)) (“In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments of bankrupts.”). Justice Brennan also stated that *Schoenthal* actually “removed all doubt that respondent’s cause of action” was legal rather than equitable because in that case, a trustee brought suit in equity for the recovery of “alleged preferential payments” on the grounds that remedies of law were inadequate. *Id.* at 33. The Court held that the suit had to be brought at law because of “the long-settled rule that suits in equity will not be sustained where a complete remedy at law . . . serves to guard the right of trial by jury preserved by the Seventh Amendment.” *Id.* at 48 (quoting *Schoenthal*, 287 U.S. at 94).

<sup>325</sup> *Id.* at 48 (quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891)).

<sup>326</sup> *Id.* at 50.

<sup>327</sup> See *id.*

<sup>328</sup> *Id.*



court.<sup>329</sup> The Court adhered to the general teaching of *Atlas Roofing*.<sup>330</sup> For Justice Brennan, this meant that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[.]” therefore, Congress could only deny this right in actions of law in which public rights are litigated.<sup>331</sup> The public rights doctrine did not include “private tort, contract, [or] property cases.”<sup>332</sup> However, Congress was allowed to “fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum” without jury trials.<sup>333</sup> For this proposition Justice Brennan cited cases including *Atlas Roofing*, *Murray’s Lessee*, and *Northern Pipeline*.<sup>334</sup> Ultimately, if Congress could not allocate the adjudication of a fraudulent conveyance to a legislative court, then logically it must be adjudicated before an Article III court.<sup>335</sup> If a matter was required to be adjudicated before an Article III court, then the parties may not be deprived of their right to a jury trial.<sup>336</sup>

To assess what public rights meant under precedent, Justice Brennan noted that *Northern Pipeline*’s definition of public rights had been rejected and now a matter was a public right if Congress acted in a “valid legislative purpose pursuant to its constitutional powers under Article I [and created] a seemingly ‘private’ right . . . so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>337</sup> Moreover, *Thomas* affirmed the portion of *Northern*

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<sup>329</sup> *Id.* at 51 (citing *Atlas Roofing Co., v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977)).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* (quoting *Atlas Roofing*, 430 U.S. at 455) (internal citations omitted).

<sup>332</sup> *Id.* (citing *Atlas Roofing*, 430 U.S. at 458).

<sup>333</sup> *Id.* at 52–53 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 589, 593–94 (1985); *N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73–76 (1982) (plurality opinion); *Atlas Roofing*, 430 U.S. at 450–61; *Murray’s Lessee v. Hoboken Land & Improvement Co.*, (18 How.) 272, 284 (1856)).

<sup>334</sup> See *Granfinanciera*, 492 U.S. at 52–53. Justice Brennan also cited *Atlas Roofing* for the proposition posited in *Crowell* that “[o]n the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself.” *Id.* at 51 (quoting *Atlas Roofing*, 430 U.S. at 450 (internal citation omitted)).

<sup>335</sup> See *id.* at 54–55.

<sup>336</sup> See *id.*

<sup>337</sup> *Id.* (quoting *Thomas*, 473 U.S. at 593–94). Justice Brennan stated: “[i]n our most recent discussion of the ‘public rights’ doctrine . . . [the Court] rejected the view that ‘a matter of public rights must at a minimum arise ‘between the government and others.’” *Id.* at 54 (quoting *N. Pipeline*, 458 U.S. at 60 (plurality opinion)).

*Pipeline* wherein the plurality stated that “matters from their nature subject to ‘a suit at common law or in equity or admiralty’ lie at the ‘protected core’ of [the] Article III judicial power.”<sup>338</sup> This reasoning, in addition to the holding in *Schoenthal*,<sup>339</sup> forced the conclusion that fraudulent conveyance actions were “quintessentially” included within the ambit of suits at common law because such actions resemble a state law contract claim.<sup>340</sup>

When Congress passed the Bankruptcy Courts and the Federal Judgeship Act of 1984 and designated fraudulent conveyance actions as a “core” proceeding under § 157(b)(2)(H), Congress did not create a new cause of action or remedies, but rather “reclassified a pre-existing common-law cause of action that was not integrally related to the reformation of debtor-creditor relations.”<sup>341</sup> The reclassification did not and could not destroy parties’ rights to a jury trial despite the deference that should be given to Congress’s decision. The denial of parties’ Seventh Amendment rights cannot be justified on the basis that permitting jury trials in fraudulent conveyance actions would “dismantle the statutory scheme” created by Congress for bankruptcy.<sup>342</sup>

### III. THE *STERN* FACTORS & BANKRUPTCY

Ultimately, the public rights framework of bankruptcy consists of the holdings of *Granfinanciera*, *Northern Pipeline*, and now, *Stern*.<sup>343</sup> By not criticizing *Granfinanciera* in *Stern*, Chief Justice Roberts conceded that at least some bankruptcy court actions may involve “public rights” and so may not be removed from Article III.<sup>344</sup> Chief Justice Roberts implicitly accepted the well-established and oft-cited definition of bankruptcy as a public right—“the relations between an insolvent . . . and his creditors, extending to his and their

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<sup>338</sup> *Id.* at 55 (quoting *N. Pipeline*, 458 U.S. at 71 n.25 (plurality opinion)).

<sup>339</sup> See *supra* note 324 and accompanying text.

<sup>340</sup> *Granfinanciera*, 492 U.S. at 56.

<sup>341</sup> *Id.* at 60.

<sup>342</sup> *Id.* at 61 (quoting *Atlas Roofing Co., v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 454 (1977)). It did not matter that the enforcement of the Seventh Amendment in fraudulent conveyance actions would potentially decrease the efficiency of bankruptcy because “these considerations” were not significant. *Id.* at 63 (quoting *Curtis v. Loether*, 415 U.S. 189, 198 (1974)).

<sup>343</sup> The influence of *Granfinanciera* was originally limited because, though relevant, the case dealt with whether a proceeding in bankruptcy court unconstitutionally deprived a citizen of a jury trial (and not whether a fraudulent conveyance was a core proceeding). *Stern* highlighted that *Granfinanciera* concluded that fraudulent conveyance actions were outside the public rights exception. See *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011). Because a fraudulent conveyance action in bankruptcy is not a public right, a bankruptcy judge may not hear and enter final judgment in a fraudulent conveyance action. See *id.*

<sup>344</sup> *Id.* at 2614 n.7.

relief,” or in his words, the “restructuring of debtor-creditor relationships.”<sup>345</sup> Consequently, courts must now work on a case-by-case basis to determine whether a matter is “core” under 28 U.S.C. § 157(b).<sup>346</sup> Which *Stern* factors are relevant may depend on the type of case at issue; how many factors must be satisfied may depend on the type of case as well, although satisfaction of one factor may be sufficient.

(1) Can the matter be pursued only by the grace of the other branches?

The first factor is the most relevant to the separation of powers argument, i.e., the degree to which the action mirrors action entrusted to another branch, which is relevant to whether it may be pursued in a forum created under Article I. Several cases discuss this factor, including *Murray’s Lessee*, *Thomas*, *Northern Pipeline*, and *Crowell*. In *Stern*, Chief Justice Roberts briefly touches upon the separation of powers problem created by Article I bankruptcy courts based on public rights: “Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes.”<sup>347</sup> According to Chief Justice Roberts, allowing Congress to permit Article I courts to decide absolutely anything it deemed “necessary and proper” would effectively whittle the caseload for the judiciary to nearly nothing, usurping the functions of the third branch of government.<sup>348</sup> The damage would ultimately mean that “Article III could neither serve its purpose in the system of checks and balances, nor preserve the integrity of judicial decision-making.”<sup>349</sup>

(2) Was the matter historically determined exclusively by the other branches?

The second *Stern* factor may be one of the less important factors for purposes of determining a public right within bankruptcy. Bankruptcy law has evolved considerably over the years. The framers, when they gave Congress the power to enact “uniform laws on the subject of bankruptcies” in Article I,

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<sup>345</sup> See *id.*

<sup>346</sup> *Id.* at 2598; see also *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853 (1986). While *Granfinanciera*, *Northern Pipeline*, and *Stern* are the only bankruptcy-specific public rights cases, the other cases addressed in this Comment are informative and form the basis for most factors.

<sup>347</sup> *Stern*, 131 S. Ct. at 2620.

<sup>348</sup> See *id.* at 2608.

<sup>349</sup> *Id.* at 2609. The independence of the Judicial Branch should be jealously guarded, as history and the framers of the Constitution have indicated. See *id.* at 2608–09 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961) (“There is no liberty if the power of judging be not separated from the legislative and executive powers.”)).

had the English bankruptcy system in mind, not the system as it exists today.<sup>350</sup> The English bankruptcy system was entirely creditor-based.<sup>351</sup> Debtors were “quasi-criminals,” commonly imprisoned.<sup>352</sup> Creditors commenced bankruptcy proceedings, not debtors struggling to pay their debts.<sup>353</sup> “[A]ct[s] of bankruptcy” included conduct that indicated the debtor was attempting to prevent creditors from recovering debts owed to them.<sup>354</sup> Furthermore, bankruptcy laws only applied to merchants; any non-merchants were subject to insolvency laws.<sup>355</sup>

### (3) Does the matter depend on the will of Congress?

The third factor differs from the others because it stems from more recent public rights cases that have made congressional intent more significant in the public rights analysis. In *Thomas*, for example, the Court discussed Congress’s motivations for creating FIFRA.<sup>356</sup> The Court in *Schor* reviewed legislative history to determine Congress’s purpose in delegating authority to the CFTC under the CEA.<sup>357</sup> However, Congressional intent to convey certain powers to bankruptcy courts is not dispositive, as evidenced in *Stern*.<sup>358</sup> The third factor will also help with the inquiries required for the fourth and fifth *Stern* factors.

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<sup>350</sup> Tabb, *supra* note 83, at 6 (quoting U.S. CONST. art. I, § 8, cl. 4).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 7. Common punishments were “forfeiture of all property, relinquishment of the consortium of a spouse . . . and death.” *Id.*

<sup>353</sup> *Id.* at 8. Today, debtors typically file for bankruptcy; however, between the 1500s and the late 1800s bankruptcy was primarily an involuntary proceeding. *Id.* Creditors would go to the Lord Chancellor to commence proceedings and appoint a commissioner to oversee the proceedings. DAVID MILMAN, PERSONAL INSOLVENCY LAW, REGULATION AND POLICY 6–7 & n. 30 (2005). The Lord Chancellor both presided over the House of Lords and was the head of the judiciary and by the 1700s, ensured the separation of powers between the executive and judiciary. HANS DAALDER, CABINET REFORM IN BRITAIN 1914–1963 20 (1963). For these reasons, it may be argued that bankruptcy is both historically judicial and historically executive.

<sup>354</sup> Tabb, *supra* note 83, at 8. By 1968, the definition of “acts of bankruptcy” included:

[I]nsolvency or suffering or permitting a creditor to obtain a preference; appointment of a receiver; hindering, delaying or defrauding creditors, failure to discharge a lien. Permitting creditor to obtain any levy, attachment, judgment or other lien; assignment, benefit for benefit of creditors; or a written admission of one’s inability to pay his debts.

BLACK’S LAW DICTIONARY 43 (4th ed. 1968).

<sup>355</sup> Tabb, *supra* note 83, at 9.

<sup>356</sup> See *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 590 (1985).

<sup>357</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986) (“Our examination of the CEA and its legislative history and purpose reveals that Congress . . . plainly delegated to the CFTC the authority to fashion its counterclaim jurisdiction . . . to further the purposes of the reparations program.”).

<sup>358</sup> See *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011). The legislative history for both the Act and Bankruptcy Court and Federal Judgeship Act of 1984 clearly illustrates Congress’s motivation for creating

(4) Does the matter flow from a regulatory scheme?

The fourth *Stern* factor is probably the most important factor when considering disputes arising under the Code. *Stern* provides an example of a case that can arise in a bankruptcy proceeding but does not *flow from a regulatory scheme*.<sup>359</sup> When applying this factor, various questions should be addressed, including: Do courts of law supply the cause of action and an adequate remedy for that cause of action? Or, is it unknown to common law? Is the cause of action from a congressionally created right? Does the cause of action involve a violation of the relevant statute? The Court in *Thomas* explained that Congress could wholly replace a traditional cause of action.<sup>360</sup>

(5) Is the matter completely dependent upon the adjudication of a claim created by federal law?

The fifth *Stern* factor cannot, within the bankruptcy framework, be saved by ancillary jurisdiction.<sup>361</sup> Unfortunately, if a cause of action is completely dependent upon the adjudication of a claim created by federal law, then the case must have a stronger tie to the particular federal law. The Court in *Schor* explained that “[t]he CFTC adjudication of common law counterclaims” fell within the public rights doctrine because the CFTC’s jurisdiction of such claims “in actual fact [was] limited to claims arising out of the *same transaction* or occurrence as the reparations claims,” indicating a possible transaction test.<sup>362</sup> In this sense, the counterclaim has a stronger tie to the federal law because both the law and the counterclaim relate to the same transaction. In *Stern*, another consideration more relevant to bankruptcy emerged: whether the case is “necessarily resolvable by a ruling on the

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courts with broad jurisdiction: to streamline the bankruptcy process and make it workable. *See supra* text accompanying note 246.

<sup>359</sup> *See supra* Part II.C.4. (discussing *Atlas Roofing Co., v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442 (1977)).

<sup>360</sup> *See Thomas*, 473 U.S. at 590. As a result, “Congress is not required . . . to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.” *Atlas Roofing*, 430 U.S. at 455.

<sup>361</sup> If ancillary jurisdiction were sufficient, the case in *Stern* may have been saved. *See Stern*, 131 S. Ct. at 2611. *But see* discussion *supra* Part II.G.2. (explaining how the Court had previously upheld the adjudication of state law claims in federal agencies subject to judicial review when the claim was ancillary to a federal law dispute).

<sup>362</sup> *See Schor*, 478 U.S. at 856 (emphasis added). Justice O’Connor also noted that the CFTC orders were “enforceable only by order of the district court,” and reviewed “under the same ‘weight of the evidence’ standard sustained in *Crowell*.” *See id.* at 852.

creditor's proof of claim."<sup>363</sup> If an action is resolved by a ruling on a creditor's proof of claim, it is plausible that the case is completely dependent upon the adjudication of a federal law.

(6) Is the matter limited to a particularized area of law?

The sixth factor emerged in *Crowell*, and appeared in a number of the later public rights cases. The factor relates more to the overall grant of power given by Congress in the regulatory scheme. For example, in *Crowell*, the agency could only hear and enter final judgments on cases that arose under the particular act.<sup>364</sup> The appropriate inquiry is whether the cause of action at issue relates to the law encompassing the particular act. For purposes of bankruptcy, the question would be—does the case relate to bankruptcy?

(7) Is the matter a situation in which Congress created an expert and inexpensive way to deal with a class of questions of fact that are peculiarly suited for examination and determination by an administrative agency?

The seventh factor should not be applied to bankruptcy matters. The factor specifically includes the term “administrative agency,” which a bankruptcy court is not.<sup>365</sup> If bankruptcy courts did qualify as administrative agencies, the rest of the inquiry would conclude in the affirmative—in that any matter could be a situation in which Congress created an expert and inexpensive way to deal with a class of questions of fact that are peculiarly suited for examination and determination by an administrative agency.<sup>366</sup>

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<sup>363</sup> *Stern*, 131 S. Ct. at 2611 (internal citation omitted) (“Vickie’s claim is a state law action . . . not necessarily resolvable by a ruling on the creditor’s proof of claim in bankruptcy. *Northern Pipeline* and our subsequent decision in *Granfinanciera*, rejected the application of the ‘public rights’ exception in such cases.”). But, of course, this question is not necessarily dispositive. A better approach may be to consider this test alongside the transaction test.

<sup>364</sup> Longshoremen’s and Harbor Workers’ Compensation Act of 1927, Pub. L. No. 92-576, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901–950); see *Crowell v. Benson*, 285 U.S. 22, 63–64 (1932).

<sup>365</sup> The distinction between Article I courts and executive agencies is whether Congress refers to the body as a “court” under Article I or an “independent agency” that is part of the executive branch. An example of this is the Tax Court, which was converted from an independent agency, part of the executive branch (that was, “for all practical purposes,” a court) to a court “established, under article I of the Constitution.” *Bankruptcy Act Revision: Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong., 2nd Sess. 2077 (1976) (testimony of William T. Plumb, Jr., Esq.); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962); *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 227 (1927).

<sup>366</sup> “Indeed, it is likely that Congress could always make at least a plausible showing that article I tribunals can provide cheaper and speedier adjudication than those created under article III, especially where the latter operate under resource and procedural constraints that do not affect the former.” Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68

Overall, *Stern* factors one and three through six are most applicable in the bankruptcy context and so should be given more weight in determining whether matters in a bankruptcy case are public rights.

A. *Applying the Stern Factors*

Consider a hypothetical in which a creditors' committee brings an action against a debtor's board of directors for breach of fiduciary duty.<sup>367</sup>

(1) Is it a matter that can be pursued only by the grace of other branches?

An individual suing another for the breach of a fiduciary duty, generally, is not a matter that is pursued by the other branches. Arguably, it is a matter that is not pursued by any branch, since many fiduciary contract cases are brought in state courts. Case law discussed above indicates that such cases are the essence of the judicial power.<sup>368</sup>

(2) Is it a matter that historically could have been determined exclusively by the other branches?

It is unlikely that any argument can be made that an action against an individual, individuals, or an entity, for the breach of a fiduciary duty, is an action that was historically determined by any branch other than the judiciary.

(3) Does it depend on the will of Congress?

No, this type of action does not depend on the will of Congress. No aspect, other than the existence of the creditor's committee, results from an act of Congress. More recent case law—such as *Thomas* and *Schor*—has shown that who the parties are in a case does not help determine if the case falls within the public rights doctrine.<sup>369</sup> In bankruptcy, any case brought by a trustee in

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B.U. L. REV. 85, 122 (1988). Additionally, the same issue develops for the seventh factor that persists in the sixth—that the factor relates more to grants of power by Congress, rather than a particular case within the framework of a Congressional grant.

<sup>367</sup> For this situation, as for all other situations, do not consider the parties involved, but only the action and its relationship to the federal scheme at issue (in this case, the Code). Keep in mind that a “yes” answer to any of the factors helps indicate that the action falls within the public rights exception.

<sup>368</sup> See discussion *supra* Part II.E. “Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 55, 70 (1982) (plurality opinion).

<sup>369</sup> See discussion *supra* Part II.G.1.

bankruptcy would receive a “yes” answer under this factor. Again, case law has shown that such a grant would be too broad.<sup>370</sup>

(4) Does it flow from a regulatory scheme?

No. A suit for breach of a fiduciary duty does not flow from a regulatory scheme (beyond the Act providing for the creation of a creditor’s committee).<sup>371</sup>

(5) Is it completely dependent upon adjudication of a claim created by federal law?

A breach of fiduciary duty does not involve a transaction with which to apply the transaction test,<sup>372</sup> nor is there a proof of claim with which to apply the proof of claim test. There is no claim created by federal law at all, and therefore, the cause of action cannot be completely dependent upon the adjudication of a claim created by federal law.

(6) Is it limited to a particularized area of law?

No. The violation of a fiduciary does not relate to bankruptcy, which would be the only particularized area of law here.

Because the seventh factor should not be applied to bankruptcy cases, the analysis is done. None of the *Stern* factors (the answers to which are all “no”) indicate that an action for a breach of fiduciary duty is a public right, and

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<sup>370</sup> A modified version of this factor would be—as stated in *Murray’s Lessee*—does the case depend on the will of Congress as to whether a remedy in the court would even be allowed? See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). There is an inherent problem with applying this version of the question to bankruptcy law (the restructuring of the relationship between a debtor and his creditors), because there was no national bankruptcy law for a period of time after 1788. Tabb, *supra* note 83, at 14 (explaining that the first federal bankruptcy law was enacted eleven years after the ratification of the Constitution—the Bankruptcy Act of 1800— and lasted only three years). After 1803 states were left to “pick up the slack” until the Bankruptcy Act of 1841. *Id.* Individuals could bring bankruptcy cases to state courts without the will of Congress. Today, individuals may still choose state law remedies for bankruptcy over federal bankruptcy law. Thus, the restructuring of the relationship between a debtor and his creditors does not depend on the will of Congress. Allowing this one factor control over the analysis would mean that bankruptcy, at its most basic level, is not a “public right.” This conclusion would run contrary to the most recent Supreme Court decisions regarding public rights. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011); *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33, 61 (1989).

<sup>371</sup> An action for breach of fiduciary duty exemplifies how, as in many cases, the third, fourth, and fifth factors may all have the same answer.

<sup>372</sup> See *supra* note 362 and accompanying text.



therefore, a bankruptcy court may not hear and enter a final judgment in the action for breach of a fiduciary duty.<sup>373</sup>

## CONCLUSION

The *Stern* decision confirmed that a bankruptcy court may not hear a matter if it does not fall within the public rights exception. Regrettably, the Court declined to give much guidance on “the public rights framework for bankruptcy.”<sup>374</sup> The proposed seven-factor analysis for identifying public rights includes key aspects from the convoluted case law history—a case law history that at times does not comport with precedent on Congress’s power under the Bankruptcy Clause or Congress’s power to establish Article I courts.<sup>375</sup> Moreover, the use of the seven-factor analysis takes into account how these key aspects of public rights case law have been interpreted by later justices, and how they ultimately shaped the *Stern* decision.<sup>376</sup> This Comment also provided an example of how these factors should be applied to bankruptcy, generally.<sup>377</sup> While each factor should be considered, factors one, and three through six are the most pertinent within the bankruptcy context: the other factors either apply only to executive agencies or (like the second *Stern* factor) would effectively tag all of bankruptcy (i.e., the “restructuring of debtor-creditor relationships”) as a private, rather than a public, right—a conclusion that clearly runs afoul of *Stern*.<sup>378</sup> Ultimately, bankruptcy judges are in a position to follow *Stern*; instead they must do their own spadework to identify permissible public rights actions under Article I with the limited tools

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<sup>373</sup> Some other hypotheticals to consider: (1) A bank files a claim based on a credit card debt. The trustee counterclaims seeking a money judgment for violations of the Florida Consumer Collection Practices Act FLA. STAT. ANN. § 599 (West 2012) (and the Federal Telephone Consumer Protection Act (47 U.S.C. § 227 (2010))). (Yes.); (2) A chapter 7 trustee sues a debtor’s mother for a fraudulent transfer. (No.); (3) A landlord files a claim for breach of lease after the lease has been rejected and the debtor files a counterclaim that the lease is unconscionable under state law and seeks to recover all rents paid over the years. (Yes.); (4) A lender files a secured claim in the bankruptcy court and the debtor files an action against the lender for usury under applicable state law. (Yes.) These hypotheticals were thoughtfully provided by Roberta A. Colton, Esq., and Judge Michael G. Williamson, United States Bankruptcy Court for the Middle District of Florida.

<sup>374</sup> *Stern*, 131 S. Ct. at 2614 n.7.

<sup>375</sup> See discussion *supra* Part II.C.

<sup>376</sup> See discussion *supra* Part II.E.

<sup>377</sup> See discussion *supra* Part III.A.

<sup>378</sup> See *supra* notes 344–45.

described by Chief Justice Roberts. Following this seven-factor analysis is a primitive, but comprehensive, tool for considering the limits of the public rights doctrine.

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